

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

No. 11,782

BRIEF FOR APPELLANT AND JOINT APPENDIX

IN THE
United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

E. MERL YOUNG, *Appellant*

v.

UNITED STATES OF AMERICA, *Appellee*

918

Appeal from the Judgment of the United States District
Court for the District of Columbia

*United States Court of Appeals
For the
District of Columbia Circuit*
FILED OCT 14 1953

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STATEMENT OF QUESTIONS PRESENTED

1. Whether the indictment (JA. 10A, et seq), charging perjury in violation of *T. 22, Sect. 2501, D. C. Code (1951)*, was fatally defective when it did not set forth the person before whom the oath was taken and the authority of such person to administer the oath?

2. Whether the systematic exclusion from jury service in the District of Columbia of persons resident therein, but who exercise voting privileges elsewhere, renders the jury panel invalid under the provisions of *T. 11, Sects. 1417, 1420, D. C. Code (1951)*?

3. (A) Whether the subcommittee of the United States Senate was a competent tribunal by reason of the fact that the alleged perjury as set forth in count three of the indictment occurred while the Senate was in session and the subcommittee had not received permission of the Senate to sit while it was in session, as required by *Section 134C of the Legislative Reorganization Act, 60 Stat. 837*, and the *Senate Manual, 1951, Senate Document No. 5, 82nd Congress, First Session, page 58*?

(B) Whether a subcommittee of the Senate is serving a legislative purpose when it holds hearings in order to show its previous report was not "asinine" as characterized by the President as well as for the purpose of permitting those who had been criticized in the report to exculpate themselves?

4. Whether substantial and the requisite corroborative evidence was produced on each of the four counts of perjury upon which appellant was convicted?

5. (A) Was prejudicial error committed by the prosecutor in arguing to the trial jury that the defendant's denial of guilt, indeed his entire defense, made no impression on the grand jury, before which the defendant

had been a witness? Did such argument in effect maintain that an indictment was evidence?

(B) Whether, in a trial for perjury, which is alleged to have occurred at the hearing of the Senate subcommittee investigating the RFC scandals, prejudicial error requiring a mistrial was committed when the prosecutor suggested that the defendant had a five percent (5%) interest in certain government contracts?

(C) Whether it was prejudicial error for the government prosecutor to ask the defendant on cross-examination the immaterial and inflammatory inquiry if he had not been charged by certain Senators with selling influence at the RFC?

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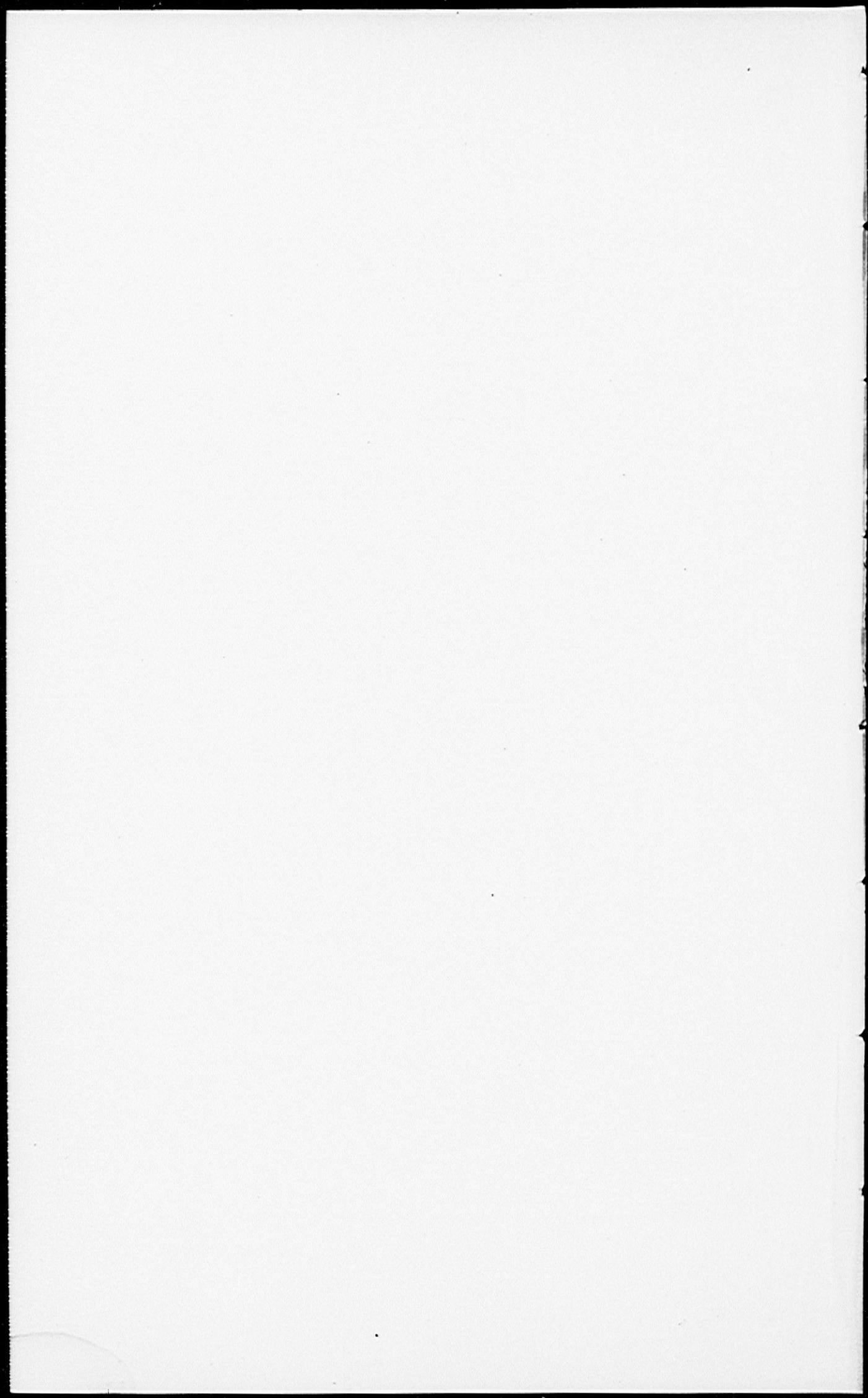
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IN THE
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No. 11,782

E. MERL YOUNG, *Appellant*

v.

UNITED STATES OF AMERICA, *Appellee*

Appeal from the Judgment of the United States District
Court for the District of Columbia

BRIEF FOR APPELLANT

JURISDICTIONAL STATEMENT

The jurisdiction of the Court is based upon *Title 28, Section 1291 of the United States Code*.

STATEMENT OF THE CASE

Appellant was convicted below upon four counts of perjury (JA. 33A). The first three counts charged perjury before the Subcommittee of the Senate Committee

on Banking and Currency, which was at that time conducting a study of the Reconstruction Finance Corporation, hereinafter referred to as RFC. The fourth count charged perjury before the District of Columbia grand jury.

I

The appellant contends that the indictment is fatally defective in that it does not allege the person before whom the oath was taken and his authority to administer it (JA. 10A et seq). The lower court's opinion thereon is found in 113 F. S. 20 (JA 28A et seq.).

II

The appellant also maintains that the indictment and each count thereof was fatally defective because it was returned by a grand jury selected contrary to *Title 11, Sect. 1417 and 1420, D. C. Code, 1951*. The appellant alleged below that all residents of the District of Columbia, who exercise voting privileges elsewhere were, as a class, systematically excluded from service on the jury (JA 24A).

III

The Government conceded below that at the time the testimony charged to be perjurious in count three was given, the subcommittee was in session without the authority of the Senate. This was in violation of the Senate Rules and *Sect. 134C of the Legislative Reorganization Act, 60 Stat. 832*. Therefore, it was not a competent tribunal under the doctrine of *Christoffel v. United States, 338 U. S., 84, 89, 93 L. Ed. 1826, 1831*.

IV

There was not sufficient corroborative evidence to sustain guilt of perjury. The substantial evidence rule required the acquittal of appellant.

V

The prosecutor committed serious and prejudicial error requiring a mistrial upon the following occasions:

a. The suggestion to the jury that the appellant was a five-percenter by asking a government witness if his contract with a manufacturer was not on a basis of five percent for government contracts obtained (Tr. 362-363).

b. Inquiring of the appellant while on cross-examination whether certain Senators on the subcommittee, before whom he was testifying, had not charged appellant with selling influence at the R. F. C. (Tr. 888).

c. Misquoting in his final argument to the jury the evidence when he argued that the appellant forgot recommending a loan of \$10,000,000 (Tr. 992-994).

d. Commenting on the subcommittee and grand jury prosecutions as evidence by arguing to the jury that appellant was not believed by the subcommittee or by the grand jury (Tr. 996-1008-1010).

STATUTES INVOLVED

Title 22, Section 2501, D. C. Code (1951)

“Every person who, having taken an oath or affirmation before a competent tribunal, officer, or person, in any case in which the law authorized such oath or affirmation to be administered, that he will testify, declare, depose, or certify truly, or that any written testimony, declaration, deposition, or certificate by him subscribed is true, wilfully and contrary to such oath or affirmation states or subscribes any material matter which he does not believe to be true, shall be guilty of perjury.”

Title 23, Section 204, D. C. Code (1951)

“In every information or indictment to be prosecuted against any person for wilful and corrupt perjury, it shall be sufficient to set forth the substance of the offense charged upon the defendant, and by what court, or before whom the oath was taken

(averring such court, or person or persons, to have a competent authority to administer the same) together with the proper averment or averments to falsify the matter or matters wherein the perjury or perjuries is or are assigned."

Title 11, Section 1417, D. C. Code (1951)

"No person shall be competent to act as a juror unless he be a citizen of the United States, a resident of the District of Columbia, over twenty-one and under sixty-five years of age, able to read and write and to understand the English language, and a good and lawful person, who has never been convicted of a felony or a misdemeanor involving moral turpitude."

Section 134C of the Legislative Reorganization Act, 60 Statutes 837, United States Code Congressional Service, 1946, page 797:

"No standing committee of the Senate or the House, except the Committee on Rules of the House, shall sit, without special leave, while the Senate or the House, as the case may be, is in session."

This statute is repeated in the *Senate Manual, 1951, Senate Document No. 5, 82nd Congress, First Session, Page 58.*

STATEMENT OF POINTS

The indictment grew out of the investigation of the RFC by the Subcommittee of the Senate Committee on Banking and Currency. The appellant, a former employee of the RFC had received the well known "mink coat." He was on trial for perjury alleged to have been committed by him before the subcommittee and for perjury committed before the grand jury of the District of Columbia. Counsel for appellant felt it was impossible to obtain a fair trial before a jury. Motion for change of venue was not deemed advisable. Accordingly, a request was unsuccessfully made of the Court and govern-

ment counsel to try the case without a jury (F.R.Cr.P. 23) (Tr. 1071).

1. The defendant was charged with perjury in four counts of an indictment. The first three counts charged perjury before the Subcommittee of the Senate Committee on Banking and Currency, which was at that time inquiring into the operations of the RFC. The fourth count charged perjury before the grand jury of the District of Columbia.

The several counts of the indictment fail to allege, as required by the *D. C. Code (1951) Title 23:204*, the person before whom the oath was taken and his authority to administer such oath. Hence, the indictment and each count is fatally defective.

2. The indictment was invalid for the further reason that it was returned by a grand jury selected in a manner contrary to the *D. C. Code (1951) Title 11:1417* in that persons resident in the District of Columbia, but who exercise voting privileges elsewhere, were intentionally and systematically barred from service on the grand jury which returned the indictment herein.

3. The Subcommittee of the Senate Committee on Banking and Currency was not, at the time alleged in Count III of the indictment, a competent tribunal under the perjury statute for the reason that the testimony of the defendant was given while the Senate was in session and the subcommittee did not have the Senate's permission to sit as required by *Section 134C of the Legislative Reorganization Act, 60 Stat. 837*.

4. The evidence was insufficient to sustain the judgment. To set forth the reasons for this conclusion would require too much detail and the appellant respectfully invites the Court's attention to the argument hereinafter set forth.

5. It was prejudicial error for the prosecutor to inquire of a government witness in a very leading manner the immaterial fact of whether there was a five percent

arrangement between him and the Binkley Manufacturing Company. It was developed that Steele, a witness for the prosecution, had asked Young's help in getting contracts and promised Young one-half of his commissions. This was cause for mistrial.

The prosecutor also asked Young, on cross-examination, whether certain Senators had not charged him with selling influence at the RFC (Tr. 888, 889). This was in no way material and was prejudicial error. To strike such testimony did not remove the evil. A mistrial was required. Further, government counsel, in his argument to the jury, stated in effect that the defendant had already presented his defense to the grand jury which did not believe him. This was a comment on the indictment as evidence. Severally and cumulatively, the effect of government counsel's misconduct deprived appellant of a fair trial.

SUMMARY OF ARGUMENT

I

Appellant challenges the validity of the indictment herein for the reason that it did not identify the person administering the oath and the authority of such person to do so. The Court below rejected appellant's contention in its opinion reported in *U. S. v. Merl Young*, 113 F. S. 20. This is contrary to the holding in *U. S. v. Debrow*, 203 Fed. 2nd (CCA 5th), 699; certiorari granted June 15, 1953.

II

The legality of the grand jury and the instant indictment returned by it was challenged by the defendant. The attack was premised upon the selection of the grand jury in a manner contrary to *Title 11, Sects. 1417 and 1420, D. C. Code, 1951*. The jury commission prepared a jury list, from which the challenged panel was selected.

It systematically excluded from the list all residents of the District of Columbia who exercised voting privileges elsewhere.

III

The third count of the indictment was based upon testimony given by the defendant before a Senate subcommittee sitting while the Senate was in session without its permission as required by *Sect. 134C* of the *Legislative Reorganization Act, 60 Stat. 832*. Therefore, it was not a competent tribunal under the holding in *Christoffel v. U. S.*, 338 U. S. 84, 89, 90, 93 L. Ed. 1826, 1831.

IV

There was not sufficient evidence under the substantial evidence rule, nor sufficient corroboration as required in perjury cases to sustain the judgment of guilt. An analysis of the testimony on all counts is set forth in point IV hereof.

V

The conduct of the prosecutor during the trial below transgressed the rules of propriety to such an extent that a mistrial should have been declared. He commented on the indictment as evidence to sustain guilt. He inquired of the appellant, while on cross examination, whether certain members of the Senate subcommittee had not accused him of influence peddling at the RFC. He also asked a question which plainly suggested that the defendant was a five percenter. None of these matters was material to the issues. The atmosphere of the trial was such that the effect of these errors greatly prejudiced the appellant and deprived him of due process of law.

ARGUMENT

I

The Indictment is Fatally Defective.

The indictment is fatally defective for the reason that it failed to allege, in each of the four counts, the person before whom the oath was taken and the authority of that person to administer an oath.

The insufficiency of the indictment was brought to the attention of the Court below by a motion to dismiss (JA 18A). It was again presented to the Court below on motions subsequent to trial.

The trial court entered a memorandum opinion, 113 F.S. 20 (JA 28A), denying this contention. It said:

"I hold this is of no moment despite the opinion of the United States Court of Appeals for the Fifth Circuit in *United States vs. Henry Debrow*, 203 F(2) 699, which I conclude is neither controlling nor persuasive."

Our local statute condemning perjury is, as said by the Court below, no different than the Federal statute. The latter is contained in *Title 18, Section 1621, U. S. Code*.

In *U. S. v. Debrow, supra*, presently on certiorari, the Circuit Court of Appeals for the Fifth Circuit held an indictment based upon *Title 18, Sect. 1621, U. S. Code*, to be defective if it did not allege the person before whom the oath was taken together with the averment of requisite authority to administer the oath. The Court said: (702)

"We think that it is essential to inform the accused by whom it is charged that he was sworn, either by disclosing the name of the person administering the oath, or his official capacity, and that he was in fact possessed of the requisite authority. These are matters of substance which affect the substantial rights of the accused. It is apparent to us as it was to the Supreme Court (*United States v. Hall*, 131

U.S. 50, 9 S. Ct. 663, 664, 33 L. Ed. 97) that there can be no conviction of perjury 'unless the oath, in regard to which the perjury is charged, was taken before an officer of some kind having due authority to administer the oath.' And to borrow the language of Judge Hutcheson in *Grimsley v. United States*, 5 *cir.*, 50 *F. 2d* 509, 511: 'as an indictment without proof cannot support a conviction, so proof without indictment cannot.' There is hardly need to say more."

See also *Hillard vs. U. S.*, 24 *Fed. 2d*, (CCA 5) 99.

The sufficiency of indictments for perjury in the District of Columbia is governed by *Title 23, Section 204, D. C. Code (1951)*.

Rule 7C, Federal Rules of Criminal Procedure, relied on by the Court below and applicable generally in the Federal District Courts provides that the indictment must contain the essential facts constituting the offense charged. It will be noticed that our own statute requires the person before whom the oath was taken to be identified as well as his authority to administer the oath. This statute was re-enacted in the 1951 District of Columbia Code, while the Federal Rules of Criminal Procedure went into effect in 1945. (*Rule 59 Federal Rules of Criminal Procedure.*)

An indictment reflects what the grand jury found from evidence submitted to it. If the grand jury has failed to find essential elements of the offense, such as we complain of here, that failure cannot be corrected or supplied by the Court or by the prosecutor in ordering or giving a bill of particulars. cf. *Jarl v. United States* (CCA 8th) 19 *F(2)* 891.

The appellant submits that direct statute law of this District required a perjury indictment to set forth the identity of the person who administered the oath and his authority to do so.

II

**The Indictment Should Have Been Dismissed Because of
Intentional and Systematic Exclusion of Qualified
Jurors from the Jury Panel.**

At the time of the selection and impanelling of the grand jury which returned the instant indictment, it was the practice of the jury commission for the District of Columbia to send a questionnaire to each prospective juror. When completed and returned the answer to the questionnaire was given consideration by the jury commission in determining qualifications for jury service. A jury list was then prepared, from which grand and petit juries were selected for service in the District Court. The grand jury which returned the instant indictment was so selected.

The questionnaire, directed to each of the prospective jurors, inquired as to whether any of them voted or exercised the franchise privilege in any of the states. If an affirmative response was made, the commission excluded from the jury list anyone so answering.

Appellant maintains that such a practice was contrary to the requirements of *Title 11, Section 1401 and 1420 of the D. C. Code, 1951.*

We are informed that in November of 1952, subsequent to the present indictment, *this practice was discontinued by direction of the District Court.*

At the time of arraignment, leave was granted the defendant to withdraw his plea of not guilty in order to attack the sufficiency of the indictment (JA 2A) (*Rule 12, F.R.Cr.P.*). Within the time so allowed, he filed a motion to dismiss. Therein, it was alleged that the indictment was bad in substance by reason of the fact the grand jury was illegally summoned and constituted (JA 17A). The specific point herein discussed was not at that time brought to the attention of the Court because counsel had no knowledge of the practice. Certain other

irregularities were set forth in the motion, including grounds apparent on the face of the indictment and which would be presented to the Court at argument on the motion.

The motion to dismiss was argued on April 29, 1952. The Court considered the motion until December 23, 1952, at which time it was overruled. On January 2, 1953, immediately after the Christmas holidays, motion for reconsideration of the motion to dismiss was filed, together with a motion for leave to file a second supplemental motion to dismiss which incorporated the contention herein made (JA 24A). We believe this was timely within *Rule 12, Sections 1B and 2, F.R.Cr.P.* That rule requires such motions to be made before trial. The instant motion was made three months prior to trial and shortly after counsel ascertained the facts. The matter complained of was not generally known or one that counsel could have been expected to ascertain. Such proceedings are presumed to have been conducted according to law. Counsel stated in his motion that he learned of the alleged defective selection of talesmen in late November 1952. The motion for leave to file the instant attack on the indictment was set for argument January 16, 1953. On January 14, 1953, in order to sustain the movants burden, he caused subpoena duces tecum to be issued by the Court below directed to the officers of the Jury Commission (JA 35A). They were commanded to produce their questionnaire records from 1945 to the date of hearing. On January 23, 1953, the instant motion, as well as the motion to reconsider the motion to dismiss was denied.

Title 11, Section 1401, et seq. D. C. Code (1951) provides for the selection of both grand and petit jurors in the District of Columbia. Of particular importance is *Section 1417 of Title 11*, which provides:

“No person shall be competent to act as a juror unless he be a citizen of the United States, a resident of the District of Columbia, over twenty-one and

under sixty-five years of age, able to read and write and to understand the English language, and a good and lawful person, who has never been convicted of a felony or a misdemeanor involving moral turpitude."

Title 11, Section 1420 of the D. C. Code (1951) provides for certain exemptions of qualified persons for jury service, not here material, and states that all others *shall not* be exempt. (emphasis supplied)

The question presented is whether those residents of the District of Columbia who vote in any of the states are disqualified to act as grand or petit jurors in this jurisdiction. We believe not.

As early as 1886, the law in this jurisdiction has been that those who lived in the District of Columbia, but voted elsewhere, were qualified for jury service. For such service they were residents of the District of Columbia. *U. S. vs. Nardello, 4 Mackey 503*. The statute there construed and the instant statute are identical, except for the provision in the later statute requiring jurors to be able to read and write.

In *U. S. vs. Cross, 9 Mackey 20 D. C., 365, (1892)*, the Supreme Court of the District of Columbia held that one who lived in the District but who voted in Maryland was qualified for jury service. The Court said:

"It is not necessary, however, for us to express any definite opinion on the question, because it seems to us that the juror in question comes fully within the term 'resident' of this District. The qualification is that the juror shall be a *citizen* of the *United States* and a *resident* of the *District of Columbia*. A man may be a citizen of a state and retain his political privileges and pay taxes, etc.; but may leave his State, his domicile where he is a citizen, for commercial purposes and *reside* for a year or more elsewhere, without losing his rights and privileges and without acquiring them in his new home, but he is none the less a *resident* in his new home. . . . The

fact that the State allowed the juror to vote does not affect the question of residence at all. We think that under the circumstances he is a resident here and amenable to the responsibilities of a resident where he is now a householder and the head of a family." (emphasis in original)

Qualified residents, as a class, must not be systematically or improperly excluded from jury service.

The manner in which grand and petit jurors are drawn in this jurisdiction was indicated by the District Court in *U. S. vs. Fields* (U.S.D.C. D.C. 1946) 6 F.R.D. 203, where the Court said:

"The Court will take judicial notice of the operations of its own agencies. The Jury Commissioners are an agency of this Court and are appointed by this Court. The Court will take judicial notice of the fact that names of jurors called for service in this Court are picked at random from the City Directory by the Jury Commissioners pursuant to an arbitrary numerical formula, in order that a sufficient number of available jurors may be obtained. Every person whose name is drawn in this impartial and mechanical manner receives a questionnaire to determine whether he is legally qualified to serve. If he is found *legally qualified*, his name is placed in the jury box. Every month, when jurors are needed, the necessary number of jurors are drawn by the Jury Commissioners from this box at random, in compliance with law." (Emphasis supplied.)

Defendant advised the Court below that those drawn from the jury list, whose executed questionnaire indicated that they exercised the privilege of voting in some other jurisdiction, were automatically excluded from selection. This occurred even though they may have been residents of the District of Columbia within the purport of the statute. The subpoena to the Jury Commission was designed to establish this fact.

In *U. S. vs. Roemig (D.C.N.D. Iowa) 52 F. S. 857, 861* the defendant filed a motion to quash the indictment returned against him upon the asserted ground that the grand jury returning the indictment was not legally constituted. The specification of invalidity was the alleged systematic, intentional and deliberate exclusion of women from membership on the grand jury. The Court said:

"A related argument is made that the defendant now before the court ought not to be heard to make the tendered objection because he has not shown that he has been injured by the manner of selecting the grand jury. This court acknowledges the rule, declared in many hundreds of cases, that indictments will not be set aside capriciously nor, specifically, in the absence of any showing of injury to the moving defendant. That rule is unquestioned, but its application cannot be allowed to sustain and perpetuate the arbitrary perversion by administrative authority of the plain mandate of the law on a fundamental question.

"Upon an indefensible basis, an identified one-half or more of those eligible to jury service in this district have been arbitrarily excluded from such service not by accident or inadvertence, but by design. Such action is operative to destroy the basic democracy and classlessness of jury personnel. It results in the consistent selection of jurors from a group or portion only of those available for service in that office, rather than from those eligible without discrimination. And that does not accord to the defendant the type of jury to which the law entitles him. It is an administrative denial of a right which the lawmakers have not seen fit to withhold from, but have actually guaranteed to him."

Appellants contention is sustained by *Dow v. U. S. Steel Corporation (CCA 3rd) 195 F(2) 478*. There, the plaintiff, in a civil action, moved to strike the jury panel on the ground that the selection of jury panels did not comply with the law. The plaintiff challenged the selection because the jury list excluded foreign born citizens,

veterans, labor people, negroes and many others. The Court vacated the proceedings and sustained the defendant's motion to challenge the "array."

The Court said: *Page 480*

"We think that the issues raised by the plaintiff's counsel are such that he should be entitled to present evidence on the point. * * * *If a jury list is improperly drawn*, or jurors are subject to improper investigation, that fact should be brought out and the improper practices stopped." (Italics ours)

* * *

"The federal statutes having to do with juries do not give many mandatory directions for compiling lists of prospective jurors. They are explicit about the illegality of discriminatory exclusion on account of race or color. They make certain disqualifications. The statute talks about the function of jury commissioner and court clerk as though a great deal of discretion was vested in those officials. That the discretion is not unlimited is likely. For example, there is a statute which puts in the judicial council for each circuit the responsibility for the general supervision of the administration of the federal judicial system of the circuit. * * *

"If a responsible member of the bar charges that the method of selecting jurors is such that his client may not have a fair trial, he should have a chance to prove it. He cannot prove it if a motion based upon the assertion of such a situation is overruled without hearing."

We submit that the statute provides that residence is one of the determining factors in qualification for jury service. Therefore, it was not within the power of the Jury Commission or the Court to add to or detract from the qualifications prescribed.

In *Walter v. State*, 208 Indiana 231, 195 N.E. 268, 98 A.L.R. 607, 610, 611, the Court said:

“The Jury Commissioners have no power to exclude from jury service a class of citizens that the legislature has included among those eligible.”

The Court continued and said that the qualifications of jurors is a matter of legislative control:

“A jury not organized in accordance with the statute is an unlawful jury and in support of a challenge it is not necessary to show that the members of the jury are not qualified jurors.”

The word *resident* as used in the instant statute is not limited to those who are *domiciled* in the District of Columbia. Rather it embraces those who make the District of Columbia their place of abode. It is a matter of common knowledge that many, many people make the District of Columbia the place of their abode and reside here while in government service even though they are domiciled in their home state. They secure the benefits of the local government. They should contribute to the administration of justice in this community. They should be included in the list for jury service as residents within the statute. As a class they must not be excluded from the jury list.

Congress never changed the wording of the statute, even though *U. S. v. Nardello, supra*, held that one *domiciled* in Virginia was a *resident* of the District of Columbia within the meaning of the statute here being considered.

We invite the Court's attention to the fact that the word *resident* in variant form has been used many times by Congress in legislating for the District of Columbia.¹

In *Sweeney v. D. C.*, 72 App. D.C. 30, 113 F(2) 25, 27, this Court had under consideration a statute which imposed a tax upon the monies and credits of any person

¹ cf. D. C. Code Title 11:1401, Title 16:401, Title 1:206, Title 11:701, Title 47:1205.

* * * *resident* * * * within said District and which described a resident as any person maintaining a place of abode in the District for three months prior to July first of each taxable year. The appellant there challenged the validity of the tax on the grounds that he was domiciled in Massachusetts. The Court said:

"The tax-imposing provision is Section 754. It lays the tax upon "the moneys and credits * * * of any person * * * *resident* or engaged in business within said District * * *." (Italics supplied) Section 756 specially defines "resident" for purposes of the assessment and creates exemptions. The statute carefully avoids using "domicil." But clearly it applies to persons domiciled in the District. Section 754 was the general, not a special, taxing act as to intangible property. The term it uses is "resident." Without more, its normal and usual meaning is "domiciled." That is true as to both inclusive and exclusive function. The section, therefore, unaided by Section 756, would tax domiciliaries and no others."

This decision holds that under that statute the word resident was equivalent to domicile. However, in *U. S. v. Nardello, supra*, the Court held that the word resident, as used in this statute, did not mean domicile. This was never changed by Congress.

In *Kristensen v. McGrath*, 86 U. S. App. D.C. 48, 179 F(2), 796, the Court had under consideration the words "every other male person *residing* in the United States" as used in the Selective Training and Service Act. The Court said at page 801:

"It is axiomatic that residence is not a term of fixed legal definition but takes on shades of meaning according to the statutory framework in which it is found."

This case was affirmed in 340 U.S. 162, 95 L. Ed. 173, 184, where that Court in passing upon the term "resident" said:

"In the absence of a determinative regulation, the meaning of the word 'residing' in § 3 (a) requires examination. The meaning of the word, of course, depends upon the meaning of 'residence.' 'Residence' sometimes equals domicile, as in voting. Again, as in taxation, one who is not a mere transient or sojourner is a 'resident.'"

In view of the above, this Court must determine the interpretation to be placed upon the word "resident" as used in the instant statute. A jury should be a cross section of those who make up the community. The word resident, as used in the statute, should not be construed as synonymous with domicile. Rather it should be comprehensive enough to include those who make the District of Columbia their place of abode even though domiciled elsewhere. The District Court recognized this when it stopped the practice of the jury commission to exclude as a class those residents of the District of Columbia who vote elsewhere.

Improper, systematic and intentional exclusion of qualified jurors has been condemned by the Supreme Court in:

Glasser v. United States, 315 U.S. 60, 86 L. Ed. 680, 62 S. Ct. 457.

Thiel v. Southern Pacific, 328 U.S. 217, 90 L. Ed. 1181, 1185, 66 S. Ct. 984, 166 ALR 1412.

Cassell v. Texas, 339 U.S. 282, 94 L. Ed. 839, 70 S. Ct. 629.

In *Ballard v. U. S.*, 329 U.S. 187, 91 L. Ed. 181, 67 S. Ct. 261, the Court dealt with an indictment returned in a Federal Court by a grand jury from which women had been intentionally and systematically excluded. The Supreme Court reversed the conviction and said:

Pages 186-187

"The evil lies in the admitted exclusion of an eligible class or group in the community in disregard of the prescribed standards of jury selection. The

systematic and intentional exclusion of women, like the exclusion of a racial group, *Smith v. Texas*, 311 US 128, 85 L ed 84, 61 S Ct 164, or an economic or social class, *Thiel v. Southern P. Co.*, 328 US 217, 90 L ed 1181, 66 S Ct 984, 166 ALR 1412, *supra*, deprives the jury system of the broad base it was designed by Congress to have in our democratic society. It is a departure from the statutory scheme.

* * *

"If, as in the *Thiel Case*, we had merely an instance of a petit jury drawn from an improper panel, we would remand the cause for a new trial. But, as we have said, the grand jury was likewise drawn from a panel improperly chosen and therefore the indictment was not returned in accordance with the procedure established by Congress. Accordingly, the indictment must be dismissed."

The indictment herein is invalid and should have been dismissed.

III

The Senate Subcommittee Was Not a Competent Tribunal For the Reason That It Did Not Have the Requisite Statutory Authority to Sit.

The third count of the indictment charged that the appellant appeared as a witness before the Subcommittee of the Committee on Banking and Currency on February 27, 1951. His answers to questions there propounded to him are alleged to have been perjurious.

It was stipulated by counsel for both parties in the trial below that the testimony made the basis of this count was given before the Subcommittee of the Committee on Banking and Currency of the United States Senate at a time while the United States Senate was in session, and, further, that the subcommittee had not obtained from the United States Senate authority to sit while the Senate was in session. (Tr. 397, 399).¹

¹ This contention was also raised in Appellant's Motion to Dismiss (JA26A).

Section 134C of the Legislative Reorganization Act, 60 Statutes 832, provides:

“No standing committee of the Senate or the House except the Committee on Rules of the House, shall sit, without special leave, while the Senate or the House, as the case may be, is in session.”

The *Senate Manual, United States Senate, 1951, Senate Document No. 5, 82nd Congress, First Session, Page 58*, contains an identical provision.

The failure of the subcommittee to obtain the permission of the Senate to hold hearings while the Senate was in session rendered the subcommittee an incompetent tribunal under the doctrine announced by the Supreme Court in *Christoffel v. U. S.*, 338 U.S. 84, 89, 90; 93 L. Ed. 1826, 1831.

We invite the Court's attention to the fact that on many occasions during 1953 application was made by a committee or subcommittee of the Senate for permission to sit while the Senate was in session.¹ Similar applications were made in prior years.

Christoffel v. U. S., *supra*, was a prosecution in this jurisdiction for alleged perjury committed before a House committee. It was contended that the committee was not a competent tribunal because no quorum was present as required by statute and rule.

¹ cf. Volume 99, Congressional Record, pages 401, 554, 609, 627, 743, 1335, 1433, 1565, 1662, 1910, 1992, 2033, 2112, 2214, 2259, 2347, 2451, 2497, 2953, 3005, 3134, 3164, 3920, 4086, 4215, 4301, 4349, 4463, 4593, 4727, 4795, 4879, 4915, 4991, 5073, 5125, 5189, 5257, 5358, 5591, 5713, 5817, 6061, 6169, 6231, 6366, 6490, 6587, 6657, 6817, 7257, 7343, 7443, 7629, 7763, 7979, 8095, 8221, 8729, 9430, 9754, 10477. On April 14, 1953, the Subcommittee on Internal Security requested permission to sit during the session of the Senate. Senator Morse objected and quoted *Section 134C* of the *Legislative Reorganization Act of 1946*; 60 Stat. 832. Senator Morse, in effect, said that the Senators should be present during debate on measures then pending.

The Court said: (page 89)

"An element of the crime charged in the instant indictment is the presence of a competent tribunal, and the trial court properly so instructed the jury. The House insists that to be such a tribunal a committee must consist of a quorum, and we agree with the trial court's charge that to convict, the jury had to be satisfied beyond a reasonable doubt that there were 'actually and physically present' a majority of the committee."

* * * *

"A tribunal that is not competent is no tribunal, and it is unthinkable that such a body can be the instrument of criminal conviction."

(page 87) * *

"It appears to us plain that even the most highly privileged business must be suspended in the absence of a quorum in the House itself.

"A similar situation obtains in the committees. The Legislative Reorganization Act of 1946, 60 Stat. 812, c 753, provides, referring to the standing committees, in § 133 (d), 'No measure or recommendation shall be reported from any such committee unless a majority of the committee * were actually present.'"

*** (p88)

"Congressional practice in the transaction of ordinary legislative business is of course none of our concern, and by the same token the considerations which may lead Congress, as a matter of legislative practice, to treat as valid the conduct of its committees do not control the issue before us. The question is neither what rules Congress may establish for its own governance, nor whether presumptions of continuity may protect the validity of its legislative conduct. The question is rather 'what rules * the House has established and whether they have been followed.'"

We submit that under this decision, no perjury could be committed as alleged in the third count for the reason that the subcommittee, sitting without authority of law, was not a competent tribunal.

The instances cited in which permission was sought and granted shows that the Senate considered compliance with the statute and its rules necessary.

The statute was not enacted in order to permit the Senate to police its committees or its members. The *Constitution* granted it the power to compel attendance at its sessions. (*Article 1, Section 5, paragraph 1.*)

The reason for the law is based upon the public policy which requires the members of the Senate to be present at its sessions. If paramount reasons compel attendance of its members at committee hearings, the Senate may, in its discretion, give such permission.

This is not something of interest solely to an individual Senator as such, or to the Senate as a whole, but it is a matter of interest and of importance concerning the people of the United States.

To emphasize the importance of compliance with the rule and statute, we invite the Court's attention to the fact that when the Kefauver committee planned to hold hearings at places other than the District of Columbia, it first obtained blanket permission to conduct the hearings whenever the Senate was in session in Washington. 96 *Congressional Record*, (May 2, 1950) page 6149.

In the *Christoffel* case, *supra*, the Supreme Court considered *Section 133(d)* of the *Legislative Reorganization Act of 1946*, 60 Stat. 812, which was enacted under the heading and designation "Committee Procedure."

Here we are concerned with the very next section of the same Act, *Section 134*. It was enacted under the heading and designation, "Committee Power."

In the *Christoffel* case, the action of the subcommittee was invalidated because of a lack of a quorum under a statute that dealt with procedure. In the instant case, the subcommittee was invalid under the next succeeding section of that statute which prescribed "committee power."

The tribunal was incompetent because it had no "power" to sit. Perjury could not have been committed

before it. Perjury cannot be committed in a judicial proceeding unless the court has jurisdiction to adjudicate and enter judgment in the case. *Wharton Cr. Law, Vol. 2, 11th Ed., (1912) page 1691, Sect. 1536*, states:

“A suit which is actually void and null from want of jurisdiction or other incurable defect is not one in which perjury can be committed.” (Cases cited)

The case of *Emery v. State*, 57 Tex. Cr. 423; 123, S. W. 133, dealt with jurisdictional proceedings in a criminal trial. Emery was convicted of perjury committed in the trial of a rapist who had absented himself during the course of his trial. A state statute required the presence of the defendant during the course of the entire trial. The appeal challenged the competency of the tribunal wherein Emery was alleged to have committed perjury by reason of the absence of the defendant during the course of his trial as required by statute. The court reversed the conviction and said:

“Without the presence of an accused in a felony case during the introduction of the evidence, the Court is without the authority to try the case; *and being without authority its proceedings would be necessarily void.*” (Italics ours)

The Court held such to be the law, even though at the beginning of the trial, the defendant was present and thereafter voluntarily absented himself. At the beginning of the trial, the Court had authority to proceed. The lack of the presence of the accused during the trial, said the Appellate Court, *took away the Court's authority to proceed and all proceedings held while it was without authority were void.*

In reversing the conviction and dismissing the defendant, the Court said:

“We are, therefore, of opinion that under the facts stated, the evidence given by appellant could not constitute perjury.”

This case is authority for the fact that jurisdiction may be lost even though it attached when the proceeding opened.¹ In this case, the committee was a competent tribunal when its sessions opened, because the Senate had not convened. It ceased to be such when the Senate went into session because the subcommittee did not obtain the requisite authority to sit. The vitalizing *sine qua non* was absent.

If the judgment of conviction upon count three is set aside, then the judgment of the Court below on all counts must fall, because of the highly prejudicial and inflammable testimony produced to sustain the allegation of this count.

The evidence under this count disclosed the "mink coat" episode, which as recently as August 9, 1953, was commented upon by Attorney General Brownell. In an article which appeared in *Parade* (a magazine supplement to the *Washington Post* and which is also circulated in the Sunday newspapers of many cities), the Attorney General stated:

(Page 6)

"But all of you remember what President Eisenhower called 'the dirtiest business in Washington'—the headlines screaming of tax case fixes, job selling and bribery, and the stories of *mink coats* and deep freezes and plush vacations." (Emphasis supplied)

The evidence produced under this count also disclosed the extensive loans which the defendant obtained from others, as well as some of his financial transactions.

The impact upon the jury of the testimony produced under this count of the indictment is obvious. It bolstered the other counts of the indictment. Guilt was al-

¹ This is quite a common situation in the law of habeas corpus; jurisdiction ordinarily exists at the outset but may be lost during the trial. Thus, in *Ex parte Nielson* 131 U.S. 176; *Ex parte Siebold* 100 U.S. 371 and *Ex parte Bain* 121 U.S. 1, it was conceded that the Court had jurisdiction of the person and the offense; it was what the Court did at the trial that caused the loss of jurisdiction and the issuance of the writ.

most a foregone conclusion. The error permeated the entire case. It affected the substantial rights of the defendant.

In *Berger v. U. S.*, 295 U. S. 78, 89, 79 L. Ed. 1314, 1321, the Supreme Court condemned the creation of prejudice by the argument of the prosecutor. Here we condemn the introduction of evidence totally immaterial because it was produced before an incompetent tribunal. Its reception, if erroneous, prejudiced the rights of the defendant on the remaining counts.

As the Supreme Court said in *Berger supra*:

“In these circumstances, prejudice to the cause of the accused is so highly probable that we are not justified in assuming its non-existence.”

To the same effect are:

Coleman v. U. S. (CAA 5th) 167 Fed. 2nd 837, 841., *Fiswick v. U. S.*, 329 U.S. 211; 91 L. Ed. 196., *Krulewitch v. U. S.*, 336 U.S. 440; 93 L. Ed. 790., *Echert v. U. S.* (CCA 8th,) 188 Fed. 2nd 337.

We submit that the testimony produced under this count infected the other counts in a manner far more serious than the wrongful admission of evidence against a co-defendant in a criminal trial such as was condemned in *McDonald v. U. S.* 335 U. S. 451, 93 L. Ed. 153 and *Nelson v. U. S.* — U. S. App. D. C. —, — Fed. 2nd —, decided July 2, 1953, by this Court. Cert. denied Oct. 12, 1953. See also, *Blumenthal vs. U. S.*, 332 U.S. 539, 551 (footnote 8), 559.

IIIB

There Was No Legislative Purpose in the Hearings of the Subcommittee at the Time the Appellant Testified On February 21 and February 27, 1951.

By appropriate motion to dismiss the indictment (JA 19A, 20A—Pars. 7, 10, 13) and also at the trial below (Tr. 158 et seq.), the defendant challenged the validity of counts 1, 2 and 3. The attack was based upon the

fact that no legislative purpose was served by the subcommittee hearings on February 21 and February 27, 1951. It was on those dates that Young testified before the subcommittee and is alleged to have committed perjury.

Senate Resolution 219 (Gov. Ex. 1) authorized the Committee on Banking and Currency or its duly authorized subcommittee to conduct a thorough study into the operations of the RFC and its subsidiaries in order to recommend legislation.

Thereafter, on February 5, 1951, the subcommittee filed an interim report (Gov. Ex. 11), in which the subcommittee found that favoritism and influence at the RFC existed. Legislation was recommended.

The subcommittee in its report said: (Gov. Ex. 11, page 1).

"The subcommittee has had under consideration and now *reports favorably* S. 514, a bill which proposes the fundamental reorganization of the Reconstruction Finance Corporation." (Italics ours)

The subcommittee also stated: (Gov. Ex. 11, page 3).

"The subcommittee believes that no one will be injured unfairly by its report. *However, it will accord the opportunity for a public hearing to those who feel that unfair injury has been given.*" (Italics ours)

At the opening of the hearings on February 21, 1951, (Gov. Ex. 14, page 595), the chairman of the subcommittee stated that its report of February 5, 1951, had been criticised and, therefore, it was its duty to develop publicly and more specifically the evidence in support of that report.

On March 2, 1951, the chairman of the subcommittee stated:

"I want to repeat this, that as far as this Committee is concerned, I think the principal objective of the study has been achieved, the principal objective.

These hearings have a very limited objective, that is to demonstrate, I hope, to the Congress and the people that the report we issued in the early part of February was not an 'asinine' report."

[Hearings before the Subcommittee of the Committee on Banking and Currency, U. S. Senate, 81st Congress, 1st Session—Lending Policy—Part 3, page 1213]²

It will thus appear that the two purposes which the subcommittee had in conducting the hearings were as follows:

- a. To permit those who had been unjustly accused to vindicate themselves in the public eye.
- b. To show that the report was not "asinine."

On February 21, 1951, the chairman of the subcommittee also said: (Gov. Ex. 14, page 596)

"I think it is only fair to say that they (the hearings) will not be extensive as they otherwise would have been, simply because *there is no particular reason for it, now that the plan³ has been proposed to Congress.*" (Italics ours)

The pronouncements of the subcommittee clearly indicated the purpose and intent of the subcommittee. It had nothing to do with any pending legislation then before the Congress or the committee. It will be noted that the perjury alleged to have been committed by Young before the subcommittee occurred on February 21 and February 27, 1951, which was from two to three weeks after the report of February 5, 1951, was submitted to the U. S. Senate and which had been characterized by the President as "asinine."

¹ After the interim report (Gov. Ex. 11) was published and prior to the subcommittee hearings of February 21, the President of the United States characterized the interim report as "asinine."

² This was not made part of the record in the Young case, but this court can judicially recognize that document.

³ President's reorganization plan submitted to Congress February 19, 1951.

Appellant contends that the actual and admitted purpose of the subcommittee was not for a lawful legislative purpose. It was a defense mechanism and ventilating medium. Testimony given before a committee whose hearings are not serving a legislative purpose, would not be material or pertinent. *Kilbourn v. Thompson*, 103 U. S. 168, 26 L. Ed. 377; *McGrain v. Daugherty*, 273 U. S. 135, 71 L. Ed. 580; *U. S. v. Rumley*, 90 U. S. App. D.C. 382, 393, 197 Fed. 2nd. 166. *Aff'd* 345 U.S. 41; 97 L. Ed. 494.

The subcommittee's departure from its proper function deprived it of a lawful legislative purpose.

Judge Wyzanski in his Standards for Congressional Investigations, Vol. 3, # 3, March 1948, The Record of the Association of the Bar of the City of New York, said. (page 97)

* * * It is unlikely that a Congressional Committee would ever avow that it had only a ventilating object. However, if a Committee did avow this was its sole purpose * * * or a Court found that was its sole object then the issue of Congressional ventilating power would be squarely raised. On that issue there are clear statements by the Supreme Court unfavorable to Congress."

In support of his conclusion as to ventilation by Congressional Committee, Judge Wyzanski cited *Kilbourn v. Thompson*, *supra* and *McGrain v. Daugherty*, *supra*.

An investigation instituted for the mere sake of investigation, or for political purposes not connected with intended legislation, or with any other matters upon which the House could act, but merely intended to subject a party or body investigated to public animadversion, or to vindicate him or it from unjust aspersions, when the legislature had no power to put him or it on trial for the supposed offenses, and no legislation was contemplated, but the proceeding must necessarily end with the investigation, would not, in our judgment, be a legislative proceeding. *Keeler vs. McDonald*, 99 N.Y. 463, 2 N.E. 615.

The purposes announced by this subcommittee constitute purposes of ventilation or vindication from what it considered unjust aspersions. First it was to obtain and publicize the views of those who believed themselves injured by the interim report. The second was to destroy the criticism by the President. Neither of them constitutes a valid legislative purpose.

The subcommittee had no power to grant relief to those who felt they had been harmed by its report and thus employ legislative time for the purpose of disputing what was said in the report or to permit those who were criticised in the report to defend themselves. Legislative power is limited to the enactment of laws. *Mitchell v. Lowden*, 288 Ill. 327, 123 N. E. 566.

The subcommittee departed from its lawful legislative purpose and from the scope of its authority. It was not performing its legislative function. While so engaged, it ceased to be a competent tribunal.

IV

The Court Below Erred in Refusing a Motion for Acquittal Upon All Counts of the Indictment Because of the Lack of Substantial Evidence to Sustain Guilt.

A

COUNT ONE

Young, a former examiner at the RFC was subpoenaed to appear as a witness before the Senate subcommittee which was investigating the RFC. He employed Paul Aiken, an experienced attorney in the District of Columbia and former Assistant Postmaster General of the United States, to assist him in the preparation of a statement to be read to that body (Tr. 916, 915). Upon matters in that statement, as read to the subcommittee, counts one and two of the indictment are based.

Aiken advised Young that in testifying before the subcommittee, he should tell them everything there was to tell and further that he had nothing to fear but perjury (Tr. 851, 852, 915).

Inasmuch as the committee had criticized Young's connection with the Lustron Corporation (Gov. Ex. 11, page 6), Aiken inquired of Young if he had had anything to do with any loan applications made by the Lustron Corporation to the RFC. Young informed his counsel that he did not have anything to do with the Lustron applications but did *service* the loans (Tr. 918).

The first count of the indictment charges Young committed perjury when he said:

"While I was employed by the Reconstruction Finance Corporation, I never had anything to do with the loan applications made by Lustron."

The indictment alleged that Young participated in his official capacity in the processing and consideration of loan applications made to the RFC by the Lustron Corporation of Columbus, Ohio, dated January 17, 1947, and June 1, 1948.

An application for a loan at the R. F. C. was described by a former director thereof as the process by which a person applies for the money requested, its consideration by the office and its eventual approval or rejection (Tr. 630).

Young maintained in the trial court that his testimony before the subcommittee was accurate and that he believed it to be true. That is his position now.

The first Lustron loan was applied for on January 17, 1947, and granted June 30, 1947. It was *serviced* by Young, as an examiner, after the *application* was approved and the loan granted.

The distinction between processing and servicing a loan at the RFC is simply this:

A loan is processed through various field and headquarters offices immediately after the loan application is

filed and before it is approved. It is *serviced* after the application is approved and granted (Tr. 634, 635, 756; see also 344, 372, 213).

The duties of an examiner processing an *application* for an RFC loan consist of: (TR. 342, 373, 634, 637, 708, 757, 759).

- a. A study of the application.
- b. An evaluation of collateral.
- c. Estimation of the financial standing of the borrower.
- d. Whether its business is conducted by good management or not.
- e. An attempt to ascertain if the borrower could operate at a profit.
- f. Finally, recommendation to the Review Committee and the Board of Directors.

A normal loan from the RFC is made only after it is processed in the following fashion:

1. The prospective borrower first makes application to the manager of the field agency of the RFC which is closest to his residence or its place of business (TR. 224-226).
2. The manager of the field office assigns the application to an examiner in the office, and he prepares a report thereon.
3. The next step is that a field advisory committee, made up of private bankers, then considers the application and makes its recommendations (TR. 277).
4. It is then forwarded by the field manager to Washington headquarters for attention where it is received in the Secretary's Office of the RFC.
5. The secretary transmits it to the office of loans in Washington.
6. An examiner in the office of loans then makes an investigation and reports his recommendations.
7. It is then transferred to the loan review committee for its recommendation and report. That committee returns the application to the loans division.
8. It is then submitted to the board of directors for its action (TR. 228, 229, 230).

Servicing of a loan is performed by an examiner, after the *application* is filed, approved and granted. It consists of seeing that reports are properly sent in by the borrower; that the payment on the loans are made at maturity and that the conditions of the application have been fulfilled (TR. 634, 759). Young had nothing to do with the application of January 17, 1947, and the Government eventually conceded this to be so and the Court so held (TR. 614, 752, 988). There was abundant testimony that he serviced the loan. Young freely admitted it.

The loan application of Lustron, dated January 17, 1947, was processed by Mr. Steele, an examiner at the RFC, who had nothing to do with it after it was granted (TR. 343-344). He was never a *service examiner* but a new loan man (TR. 372).

The application for an additional loan, dated June 1, 1948, was received in the Cleveland office of the RFC (Gov. Ex. 16) and was processed there (Gov. Ex. 17) and eventually brought to Washington by Mr. Boardman, the Cleveland examiner (TR. 628).

The Government primarily relied upon Gov. Ex's. 16 and 17 to sustain the charge that Young participated in his official capacity in the processing of the application of Lustron for an additional loan dated June 1, 1948.

It also depended upon Mr. Macartney, who was chief of the Office of Loans in the RFC headquarters at Washington, D. C. Young was an examiner in Macartney's office. Macartney testified that the duties of an examiner in the Washington office were to examine and study an application and then to write *his own* report with his recommendations (TR. 225). Young did not do that in either of the Lustron loans, nor did he receive the instrument (Gov. Ex. 17) upon which the Government heavily relied until after Macartney did (TR. 229). This was subsequent to action by the Review Committee (TR. 231). Mr. Macartney had no recollection of sending the instrument to anyone after it was signed by him (TR. 239).

Harvey J. Gunderson, an RFC director at the time of the Lustron loans, testified that the loans to it by the RFC were not normal loans (TR. 619, 623, 705). He said that Congress had delegated to the RFC the responsibility of creating a prefabricated housing industry in order to relieve the war-time housing shortage (TR. 705). It directed the RFC to use its emergency war powers to aid and assist in prefabricated housing (TR. 623). The loans to Lustron were made with little or no collateral and were practically advances to get the industry started or, as Mr. Gunderson said,

“Writing a check to get the job done” (TR. 624, 708).

Further, the problems involved in the Lustron loans were not credit problems or problems with which RFC employees had any experience in or training upon (TR. 690). Many of the normal procedures were by-passed (TR. 684). *This testimony was not controverted.*

In addition to the documentary evidence and the testimony of Macartney and Steele, the Government also presented part of the testimony given by Young before the grand jury (Gov. Ex. 26). It introduced certified copies of records of the RFC, which applied to the loans of January 17, 1947, and June 1, 1948. Every exhibit relative to the application of Lustron dated January 17, 1947 (Gov. Ex's. 18, 19, 20, 21, 22, 23, 24 and 25) was admitted over the objection of the defendant. Gov. Ex. 24 was the original Lustron application of January 17, 1947. Exhibits 18 through 23 showed that Young *serviced* the loan applied for on January 17, 1947, which had been *processed* by Examiner Steele (TR. 343, 344, 372). The adverse effect of reading these exhibits to the jury, although later stricken by the Court, (TR. 812) was inevitable.

Gov. Ex. 16 (Tr. 211) was a letter, dated June 1, 1948, sent by Lustron to the Cleveland Office of the RFC seeking to increase its original loan. Gov. Ex. 17 (Tr. 215) was a report dated July 1, 1948, from the Cleveland

Agency of the R. F. C. It contained that office's recommendation on the additional loan applied for. That instrument also contained the legend:

"Concur:

"Morton Macartney
"E. Merl Young"

The concurrence above mentioned is the crux of the government's case.

The testimony of Young before the grand jury (Gov. Ex. 26) shows that Young considered himself a service examiner on the second loan, and that he had nothing to do with the application as such. He there testified that the report of the Cleveland agency (Gov. Ex. 17) was signed by him because he was the service examiner on the original loan (11,974, 11,975). He signed it upon the instruction of his chief (11,979). He also told the grand jury that when he "concurred," he approved the conclusions of Mr. Luce and Mr. Kitt.

Gov. Ex. 17 contains the following:

"Existing circumstances as we see them justify favorable consideration of an additional advance for working capital. If such action is deemed advisable by the Directors at this time and a loan or CPC* advance is authorized, the terms and conditions as set out in the attached report of Agency Examiner Paul Boardman, dated June 15, 1948, appear adequate, subject to conditions 5 and 8, e.(i) and (ii) being changed to provide that collateral shall be subject to the first loan." (Note: *Abbreviation for care and preservation of collateral)

This was signed by Mr. Luce and Mr. Kitt of the Review Committee and concurred in by Young and Macartney.

The preservation of collateral was the function of a service examiner.

In the trial below, Young stated that although Mr. Macartney, who was the chief of his division, had not personally talked to him about the matter, he signed the

concurrence because he received a memorandum from Macartney reciting:

“Please sign and return.”

This he did because he had serviced the original loan (Tr. 762, 819, 854).

It will be noted that the conclusions of the Review Committee, which normally occurs after the processing examiner has reported, referred to the collateral on the original loan.

The memorandum incident was not denied. Mr. Macartney had no recollection of sending the instrument to anyone for signature (Tr. 239). He did not see Young sign it (Tr. 217).

Young denied that he was making an official recommendation because he was not qualified to write a report on so large a loan (Tr. 854, 855).

In order to show that Young believed the testimony made the basis of this count to be true and that the Government failed to prove the contrary, the appellant wishes to invite the attention of the court to the fact that the application was sent to and received by the Cleveland office of the RFC. (page 1, Gov. Ex. 16). It provided for the same collateral as the original note (page 2, Ex. 16). The original loan had been granted after it had been processed by Examiner Steele, who thereafter had nothing further to do with it (Tr. 343, 344). It was serviced by Young. Paul Boardman was the agency examiner thereon (page 1, Gov. Ex. 17). He came to Washington and prepared appropriate examiner's reports (Tr. 628). Practically all of Boardman's time was spent on the Lustron loan (Tr. 697, 706). It was Macartney, Boardman, and the Stone and Webster's report upon whom and which Mr. Gunderson relied (Tr. 624, 627, 689, 715). The board of directors of the RFC also relied upon Stone and Webster, Macartney (Tr. 686) and

Boardman (Tr. 692). *None of this testimony or evidence was controverted.*

It is inconceivable that with the investigative resources of the Department of Justice, this testimony would not have been repudiated if it could have been. This is particularly true when we consider that RFC is another Federal department.

Further, it will be noticed that the application and the recommendations thereon (Gov. Ex's. 16 and 17), which are the very crux of the Government's case, both originated in Cleveland where Examiner Boardman was stationed. Boardman's report was considered by the Review Committee and the directors (TR. 671-692). No other officer or employee of the RFC testified as to Merl Young's connection with Lustron loans except Mr. Macartney, who testified that Young had something to do with the Lustron loan (TR. 203). The latter statement was stricken (TR. 205), but even that did not mention Lustron *applications* which is all count one referred to.

The report dated July 1, 1948 which originated in Cleveland (line 1, Gov. Ex. 17), did not take the usual course of procedure at the RFC (pages 31, 32 *supra*). It was not submitted to the Agency Advisory Committee. The agency examiner conditionally recommended the loan. The Review Committee in Washington recommended favorable consideration (Gov. Ex. 17, pages 1 and 8). All of this evidence confirms the defendant's contention that he had nothing to do with Lustron applications. The function of processing the loan and recommendation thereon were performed by Boardman. It was he upon whom all relied. Gunderson considered that no Washington examiner had anything to do with the second loan (TR. 708).

Of the utmost importance is the uncontroverted testimony of Gunderson that the signature of Young on the \$10,000,000 loan was technically *servicing* the original loan

because it was a shifting of funds made available under the original loan (TR. 695).

Gunderson testified that when he first saw Gov. Ex. 17, the names of Macartney and Young were not on it (TR. 625).

He was asked: TR. 631, 632.

"Q. Did there come a time, Mr. Gunderson, when the papers, the application, or whatever it may have been, of June 1, 1948, by Lustron to the RFC, was before you without the name 'E. Merl Young' on it?

"A. Yes, sir.

"Q. What, if anything, was said about getting the name 'E. Merl Young' on it?

"A. My recollection was that at the time this was being discussed—and I can't say whether it was in a formal board meeting or an informal discussion—my recollection was that when a group of us were talking about this additional loan, that Mr. Macartney, who is chief of the office of loans, had personally examined the aspects of the loan that we were concerned with at that time, as well as having—Mr. Macartney, by the way, is an engineer, a very fine engineer, and he had gone very carefully into the reports of Stone & Webster, and I might say that some of us had some grave doubts about making this particular loan, and it was not customary for the chief of the Office of Loans to sign any papers in the proceedings toward making or not making a loan. But in this case, because Mr. Macartney had done all this work, and because his opinion was relied on, the suggestion was made that he be asked to sign the report.

"Q. He, Merl Young?

"A. No, Mr. Macartney. Everybody I think agreed that that would be all right, and somebody suggested that Mr. Merl Young, who had been doing *servicing* work on the loans, be asked to sign the report." (*Italics ours*)

* * *

(TR. 636-638)

"THE COURT: Is it your testimony that with respect to this Lustron application, even though the defendant Young's name appears on it—we are speaking now of the integrated application—in conjunction with that of Mr. Macartney, that that was not the usual practice, and the purpose of his signature upon that was what, did you say?

"THE WITNESS: I know the purpose of Mr. Macartney's signature. One of the reasons I recall this incident is that I never could understand why Mr. Young's signature was on it.

"THE COURT: And your reason for not understanding that was what?

"THE WITNESS: It was not customary in the first place to have an examiner sign an application, particularly at that time. The reason for Mr. Macartney's signing was that he had personally examined the Stone & Webster engineering reports, and had gone out and personally examined the Lustron plant, and he believed that this additional loan was warranted, that the project would be successful.

"THE COURT: I thought you told me, however, that engineers and lawyers, for example, examine a loan application and make a report?

"THE WITNESS: Yes, sir.

"THE COURT: They sign the report and then that report would be appended to the application and the application, together with the appended reports, would go on to somebody else. Is that right?

"THE WITNESS: Yes, Your Honor. The actual physical manner in which this would look is if you had an engineer make a report, he would make a separate report. It would be called an engineering report. The examiner, the principal credit examiner, would make an examiner's report. Those two, if you had both, would be collected in a summary report by the review committee.

"This document that I have here is a summary report prepared by the review committee, and it lists the various actions by the people who have acted on the application up until that point.

"THE COURT: I thought your testimony was that Mr. Young was engaged in servicing loans rather than examining them.

"THE WITNESS: The original applications, yes indeed, that is my understanding."

Young was not present when the board considered the application on July 9, 1948 but examiner Heinrick was. (TR. 733-734).

Young's defense was that while testifying before the subcommittee, he advised it what he considered then and still considers the fact to be that he had nothing to do with Lustron applications to the RFC for loans. He testified below that he serviced the original loan after the application had been approved (TR. 760) and that he never processed a loan in excess of \$1,000,000 (TR. 760).

Macartney testified that he personally signed Gov. Ex. 17 in his official capacity in order to see that it was properly channeled and said:

"I wasn't assuming a responsibility for the credit matters in any of these reports that were coming to my desk." (TR. 218)

Young had nothing to do with credit matters. That was the function of a process examiner (*Supra* page 31).

Motion for finding of acquittal was made and denied (TR. 922 to 930).

The basic question is whether the Government proved by substantial evidence that Young testified falsely when he said:

"While I was employed by the Reconstruction Finance Corporation, I never had anything to do with the loan applications made by Lustron."

and further that Young did not believe that statement to be true.

The testimony of Gunderson caused the court below to have serious misgivings about the sufficiency of the Government's case on count one. The court commented on the absence of RFC records or personnel indicating that Young was other than the service examiner on Lustron

loans. The Government counsel commented to the Court that Gunderson was a perfect defense witness (TR. 639-640).

We submit that there was not sufficient evidence to permit a verdict of guilty upon the first count. It is for the Court to determine whether the quantitative rule in perjury cases has been satisfied before submitting the cause to the jury. *Smith vs. U. S. (CCA 6th) 169 Fed. 2nd. 118, 122.* The uncorroborated testimony of a single witness is not enough. *Weiler v. U. S., 323 U.S. 606, 609, 89 L. Ed. 498; Hammer v. U. S., 271 U.S. 620, 70 L. Ed. 1118; U. S. v. Wood, 14 Peters 430, 10 L. Ed. 527; Buckner v. U. S., 81 U.S. App. D.C. 28, 154, Fed. 2nd., 317, 318.*

Gordon v. U. S., (CCA 8th) 5 Fed. 2nd., 943, 945 adds that indubitable facts absolutely incompatible with the truth of the testimony charged to be false may be ample to sustain a guilty verdict.

In *Maragon v. U. S., 87 U. S. App. D. C., 349, 350, 187, Fed. 2nd. 79, 80,* the defendant testified before a Senate committee that he did not have any bank account in the years 1945 or 1946 except at the Union Trust Company in Washington, D. C. The Government established that he had a bank account in San Antonio, Texas. It did this by bank records and by cashier's checks bought by him in Washington and deposited in the San Antonio account and by admissions made by Maragon to the representatives of the Senate subcommittee. No witness testified specifically that he had a bank account in Texas. Maragon contended that the evidence was not sufficient under the quantitative rule. This Court said:

"The Government in the present prosecution did not rest upon the uncorroborated testimony of one witness. It rested upon an accumulation of *uncontroverted* documentary evidence, supplemented by identification of appellant as a party to some of the documents, and upon statements by appellant. We think the rule was not violated." (Italics ours)

In the instant case, documentary evidence consisting of Young's concurrence on Gov. Ex. 17 was introduced to sustain the Government's burden. Macartney's testimony which established nothing adverse to Young was also presented. The testimony of Young before the grand jury (Gov. Ex. 26) was added. It showed that Young told that body he signed and concurred in the report because he was the servicing examiner on the original loan (page 11,974). Further, the documentary evidence relied upon by the Government indicated only that Young set forth on that instrument that he "concurred" in the Cleveland agency's report and the action of the Washington Review Committee. Such concurrence resulted from an order of Macartney. It did not show he had anything to do with the application granting the second loan to Lustron, which is the essence of the charge. We submit that the overwhelming evidence was to the contrary and acquittal by the Court should have been entered.¹

The conclusion reached below that Young wilfully and falsely swore that he had nothing to do with Lustron applications as made to the subcommittee and further that he did not believe that statement to be true rested upon conjecture and was clearly contrary to the evidence.

In *Cook v. United States*, 26 App. D. C. 427, this Court announced: Page 430

"A person accused of perjury cannot be convicted upon the uncorroborated testimony of one witness. The charge must be proved either by the testimony of two witnesses, or by one with proof of corroborating circumstances. The corroboration must be by proof of independent and material facts and circumstances tending directly to corroborate the testimony of the witness for the prosecution, and must be of a strong character, and not merely corroboration in *slight particulars*." (Italics ours)

¹ *Kelly v. U. S.*, 90 U. S. App. D. C., 132, 194 Fed. 2nd. 150.

There was no evidence of guilt unless the jury be permitted to assume that Young's concurrence as a service examiner placed on Gov. Ex. 17 as such, caused him to have something to do with the second Lustron application. That could be no more than slight. The testimony of all witnesses, including the defendant, excluded guilt. The documentary evidence was controverted and explained in a manner thoroughly consistent with innocence. There was no evidence upon which a reasonable mind could fairly have concluded guilt. The motion for acquittal should have been granted because the evidence inescapably produced a reasonable doubt under this count. cf. *Isbell v. U. S.* (CCA 8th) 227 F. 788; *Hammond v. U. S.* 75 U. S. App. D. C. 395, 127 Fed. 2nd. 752; *Curley v. U. S.* 81 U. S. App. D. C. 389, 160 Fed. 2nd. 229, and *Stoppelli v. U. S.* (CCA 9th), 183, Fed. 2nd. 391.

In *Curley v. U. S.*, *supra*, this Court said:

"It is the function of the judge to deny the jury any opportunity to operate beyond its province. The jury may not be permitted to conjecture merely, or to conclude upon pure speculation or from passion, prejudice or sympathy. The critical point in this boundary is the existence or non-existence of a reasonable doubt as to guilt. If the evidence is such that reasonable jurymen must necessarily have such a doubt, the judge must require acquittal, because no other result is permissible within the fixed bounds of jury consideration."

* * * *

"The true rule, therefore, is that a trial judge, in passing upon a motion for directed verdict of acquittal, must determine whether upon the evidence, giving full play to the right of the jury to determine credibility, weigh the evidence, and draw justifiable inferences of fact, a reasonable mind might fairly conclude guilt beyond a reasonable doubt. If he concludes that upon the evidence there must be such a doubt in a reasonable mind, he must grant the motion; or, to state it another way, if there is no evi-

dence upon which a reasonable mind might fairly conclude guilt beyond reasonable doubt, the motion must be granted."

In *Kelly v. United States*, 90 U. S. App. D. C. 125, 130, 194, Fed. 2nd., 150, 156, this Court reversed a conviction where the evidence inescapably produced a reasonable doubt as to guilt and said:

"We have many times reviewed the sufficiency of the evidence in criminal cases and have upon occasion reversed for lack of sufficient evidence to convict. We are of clear opinion that this judgment of conviction must be set aside for lack of the requisite proof to convict."

The Government did not prove beyond a reasonable doubt the guilt of appellant. On the contrary, we believe his innocence was established. Our only conclusion as to why guilt was found was the nature and notoriety of the case, and the inability of the jury to exclude from its mind the great amount of evidence as to the first loan to Lustron of \$15,500,000 and particularly Gov. Ex. 19, which was a travel voucher showing that Young went to Cleveland, Ohio, in September 1947 to meet with Lustron officers *regarding loan application* (TR. 249). To this must be added the prejudicial conduct and argument of the prosecutor more particularly discussed in point V of this brief.

It is submitted that the Court should have entered a judgment of acquittal on this count.

(B)

COUNT TWO

The second count of the indictment charged that on February 21, 1951, Young committed perjury before the subcommittee when he stated:

"All my income since leaving Government employ has been in the form of salaries from employers or advances from companies in which I owned an interest. I have never received 1 cent in the form of fees or commissions from anyone."

The Government alleged that on May 18, 1950, Young received \$312.50 from the partnership of Ribenack and Steele pursuant to an agreement between Steele of that firm and Young. It charged that the agreement between them was that Young would assist Steele in rendering services to the Binkley Manufacturing Company, which was, at that time, a borrower from the RFC.

Materiality was alleged in that the committee was seeking to determine the nature and the extent of Young's contacts, actions and dealings with officials and directors of the RFC while he was representing clients at the RFC.

To sustain the charge, the Government showed that Steele resigned from the RFC in order to enter business in Washington as a manufacturer's representative and financial consultant. Mr. Binkley, of the Binkley Manufacturing Company, came to Washington and employed Steele as his Washington representative.

The Binkley Company had a loan at RFC which had not been paid. There was no testimony that it was in default.

Steele was employed to ascertain what governmental departments were accepting bids for contracts which the Binkley Manufacturing plant could bid on (Tr. 350). There was no testimony that any effort was to be expended on any RFC matter.

In April of 1950, Binkley agreed to pay Steele \$7,500 per year in monthly installments of \$625 (Tr. 382-387). Steele stated that he was interested in getting new business for Binkley and asked Young if he would help him by introducing him around. If so, he would do the leg work and give Young 50 percent of any fees that he might get (Tr. 353). Young did not agree, but stated:

"You are new in the business, and I will be glad to do anything I can to help you." (Tr. 354)

No agreement was reached between them (Tr. 355). In May 1950, which was shortly after Steele received from Binkley the first check for \$625, he went into Young's office and threw a check for \$312.50 upon his desk and said "here is what I owe you" (Tr. 354). Young refused the check (Tr. 354). He didn't want it (Tr. 370). Steele threw it on Young's desk and walked out. Young eventually cashed the check (Tr. 370, 379). No services were rendered by Young to Steele, and no effort of any character was made at the RFC by either Young or Steele (Tr. 370-371). Young received no part of the balance of the \$7,500 paid by Binkley to Steele (Tr. 371-378). Young never agreed with Steele to accept fees or commissions on RFC business or any government business (Tr. 375).

The Government also presented Mr. Binkley, who confirmed Steele's employment by his firm and the terms of it (TR. 382-387). Steele and Binkley went to Young's office where Steele talked to Young about procuring government contracts for the Binkley Manufacturing Company (TR. 391). Again there was no testimony that RFC matters were involved or even discussed. This was the Government's case upon the second count. Young testified that he never agreed with Steele that he would do anything at the RFC for Binkley or anyone else (TR. 768). Nothing was said to Young or asked of him by the Senate subcommittee in relation to the Steele matter (TR. 768). His defense was that in testifying before the subcommittee, he simply did not recall the \$312.50 that was given to him by Steele some ten months before and that it had slipped his mind completely (TR. 766-767). There was no other testimony from either party on this count of the indictment.

Appropriate motions for acquittal on this count were made and denied at the close of the Government's case

(TR. 574), and at the close of the whole case (TR. 922).

Was the statement of Young to the subcommittee, as alleged in count two of the indictment, material? We believe not.

To constitute perjury the testimony must be of a material fact. *Robinson v. U. S.*, 72 App. D. C. 254, 114 Fed. 2nd. 475; *U. S. v. Creech*, 21, F. S. 439 (D. C. D. C.); *Pyle v. U. S.*, 81 U. S. App. D. C. 209, 156 Fed. 2nd. 852; *Doan v. U. S.*, 202 Fed. 2nd. 674 (CCA 9th); *Hill v. U. S.*, 54 Fed. 2nd. (CCA 10) 599; *Seymour v. U. S.*, 77 Fed. 2nd. (CCA 8) 577; *U. S. v. Henderson*, 185 Fed. 2nd. 189 (CCA 7th); *Moran v. U. S.*, 194 Fed. 2nd. 623, (CCA 2nd).

Senate Resolution 219 (February 8, 1950) (Gov. Ex. 1), which empowered the instant subcommittee to act, authorized and directed a thorough study into the operations of the RFC and its subsidiaries.

The receipt of money by Young from Steele, which was neither a fee nor a commission, was not material or germane to the inquiry authorized by the Senate. The transaction did not involve RFC in any manner.

Even if material to the inquiry, the testimony which was made the basis of count two was not sufficient to establish guilt.

We conceded Young testified as alleged in the second count of the indictment. We conceded Young received \$312.50 from Steele. We denied that the money received by Young was for services rendered or to be rendered by him to Steele or to assist Steele and the Binkley Manufacturing Company, a borrower at RFC, as alleged in count two. The government did not prove that he did.

Steele and Young both testified there was no agreement between them (TR. 355, 375, 768). Binkley said nothing about it. Steele gave funds to Young by throwing a check for \$312.50 on his desk, and at that time he said: "Here is what I owe you." (TR. 352, 354, 370).

Nothing had been done by Young for Steele (TR. 370). The check was delivered by Steele to Young pursuant to

what Steele characterized as a "gentleman's understanding" (TR. 354, 376). Steele admitted Young *never agreed to such a gentleman's understanding* (TR 378). It was not established that the money was a fee or a commission. Both must be based on services rendered.¹ There was no proof of any assistance by Young to Steele on behalf of the Binkley Manufacturing Company as alleged in the indictment.

It is obvious that Young never wilfully testified falsely, as in this count set out. He had no reason or motive to lie. He was never asked by the subcommittee about it. It was not so germane to the inquiry as to naturally suggest itself to him or prompt him to remember it. It was quite insignificant. His relations with Steele or Binkley were never discussed at any time during the hearings before the subcommittee or subsequent grand jury proceedings.

It is unreasonable to suppose that Young, having been advised by counsel that he had nothing to fear but perjury, would willingly and freely disclose transactions amounting to hundreds of thousands of dollars (Gov. Ex. 14, pages 618 to 622, 889, 890, 893, 899, 913, 915, 919, 920), and at the same time deliberately hide the receipt of \$312.50, the circumstances of which were innocuous. He simply forgot the unimportant incident. That it slipped his mind was evident. Conviction on such tenuous evidence is intolerable.

This is but another indication that Young was caught in a whirlpool of adverse publicity, hostile atmosphere, and public indignation, condemned in *Delaney v. U. S.*, (CCA 1st) 199 Fed. 2nd. 107. The Court below should have tried the case without a jury as requested by the appellant.

Testimony alleged to be perjurious must be given wilfully and deliberately and with knowledge that it was

¹ Words and Phrases, Perm. Ed., Vol. 16, page 308 et seq.

false, 41 *Am. Jur. Sect. 8*, page 7. Inadvertence, mistake, or even swearing rashly or inconsiderately, is not perjury. *Wharton Cr. Law*, 11th Ed., (1912) Vol. II, p. 1671, Sect. 1509. A mistake is not enough to convict. The oath must not only be false, but must be wilfull and malicious. *U. S. v. Wood*, 14 Peters 430, 10 L. Ed. 527; *Otto v. U. S.* 54 Fed. 2nd. (CCA 2nd) 277, 279.

The circumstances of the testimony given by Young and charged to be perjurous under this count of the indictment were such that the burden was on the Government to prove beyond a reasonable doubt that the statement by Young was not given inadvertently. *Luse v. U. S.*, 49 Fed. 2nd. 241, 246, (CCA 9th). The Government was required to prove guilt by substantial evidence, which excluded every hypothesis but that of guilt. *Fotie v. U. S.* (CCA 8th) 137 Fed. 2nd 831, 840. There was no circumstantial evidence in this case, such as existed in and held to be sufficient in *Behrle v. U. S.*, 69 App. D.C. 304, 100 Fed. 2nd. 714. There was no motive such as existed in that case. Where no motive exists, guilt must be clearly and convincingly proved. *State v. Daniels* 38 S.D. 81, 160 N.W. 723; *Scott v. Cook*, 62 Ky. 314. Circumstantial evidence, to sustain guilt of perjury, must be clear, convincing, direct and proved beyond a reasonable doubt. *Smith v. U. S.*, (CCA 6th) 169 Fed. 2nd. 118, 121. We submit it was not established. An inference of guilt is not enough. *Fotie v. U. S. supra*. The failure of Young to disclose this transaction was a simple mistake and nothing else. Under the authority of *Kelly v. U. S. supra*, and other cases cited in the argument upon the first count herein, the motion for acquittal should have been granted. The case took eight days to try. Serious questions of fact were presented. The jury deliberated only two and one-half hours, including the luncheon recess, to reach a verdict on all counts. This indicates the effect of the prejudicial and damaging publicity of the

fur coat and the interjection by the prosecutor of influence peddling and the five percenters as well as his improper argument hereinafter discussed.

COUNT THREE

This count is fatally defective in that the subcommittee of the Committee on Banking and Currency of the United States Senate was not a competent tribunal at the time the testimony charged to be false in count three was given. The reasons therefor are set forth in point three hereof.

Young's entire testimony before the subcommittee is contained in Gov. Ex. 14. It is indexed therein. His extensive financial and other transactions were developed. Financial transactions and items aggregating almost a half million dollars were testified to by Young upon answer to inquiry by members of the subcommittee. (Gov. Ex. 14, pages 618, 620, 621, 622, 889, 890, 893, 899, 913 and 915).

The Government produced Mr. Wesley J. Peoples as a witness to sustain count three. He testified that he was president and chairman of the board of the United States Radiator Corporation, president of the Detroit Terminal Warehouses, and president of the Sumpter Realty Corporation. Peoples owned or controlled Sumpter (TR. 414). Peoples wanted Lustron business (TR. 401). He thought that Young would be useful in obtaining such business (TR. 401). He knew Young was leaving Lustron.

Young approached Peoples some time in October 1949 and said he was short of funds. He asked if Peoples could help him. On October 11, November 7, and December 15, 1949, checks of the Sumpter Realty Corporation each in the amount of \$1,000 were mailed to Young and deposited to his account (TR. 406). There was no request for a note (TR. 407). The checks were charged

to a notes receivable account of Sumpter (TR. 407, 408). Sumpter checks were issued rather than Peoples' checks for convenience (TR. 409). The debt was eventually charged to Mr. Peoples' personal account because of non-payment (TR. 409, 412). Over objection, Peoples stated that a year later he personally paid the obligation to the corporation. Young's debt to Sumpter was then transferred to Peoples (TR. 415).

On February 27, 1951, the debt was due, owing and unpaid (TR. 417), but there was no testimony as to whom it was due except Peoples' statement admitted over objection that he considered the loan a personal transaction (TR. 414).

There was no formal demand by Peoples or the corporation for the money (TR. 418).

At the time Young was under interrogation on February 27, 1951, the circumstances surrounding the hearing were hardly conducive to calm and deliberate thought. Kleig lights flooded the hearing room. Light bulbs for picture taking were flashing. Television and newsreel cameras were focused upon him and made him nervous (TR. 776, 777, 866).¹

Young testified in the trial below that when he answered "None that I know of," he was giving his best recollection at the time and could not recall any other loans (TR. 780). Again there was no reason or motive to lie. In fact, in the very next question from Senator Douglas to Young he admits an indebtedness of \$7,000 to an insurance company. His entire testimony to the subcommittee discloses financial transactions of over \$400,000. Here the question and answer were taken out of context in order to impute a meaning contrary to that which the full context shows. This is condemned in *Fotie v. U. S.*, *supra* and *Meyers v. U. S.*, 84 U.S. App.

¹ See *Kleinman v. United States*, (D. C. D. C.) 107 F. Supp. 407.

D.C. 101, 107, 171 F2, 800. Further, when testifying before the subcommittee, his books and papers were in the possession of the subcommittee and had been obtained by subpoena. Young did not have access to them.

Mr. Charles A. Koons was also called as a witness and testified that Young telephoned him in the fall of 1949 and asked Koons to get for him 1,000 shares of the F. L. Jacobs Company stock (TR. 432). Koons thereupon contacted a Mr. Capen of a brokerage office in New York and purchased the stock (TR. 432). Several weeks later, Koons called Young and told him that the broker wanted payment (TR. 432). Over the objection of defense counsel, Gov. Ex. 33, which was a check drawn by Koons on the Chemical Bank, New York, dated November 10, 1949, in the amount of \$5,983.80, was admitted in evidence (TR. 433). It was made payable to cash. Young's endorsement was not on it (TR. 433). It had the word "loan" on its face. There was no testimony that Young had ever seen the check and he denied that he had (TR. 784, 785). Koons stated that he considered it a debt due and owing to the Charles A. Koons Company of which he was a partner (TR. 434). As of February 27, 1951, Young had not paid him (TR. 434).

Later in 1949, Koons transmitted an order to purchase Follansbee Steel stock for Young (TR. 533). Young did not advance any funds for it. Subsequently the stock was sold. Check for the profit was sent by Koons direct to Young (TR. 533, 796).

In December of 1949, Young went to work for Koons at \$1,500 per month. Young remained so employed during January and February, 1950 (TR. 434). He was paid a total of \$4,500 (Gov. Ex. 34, TR. 436). Koons made no demand upon Young for the alleged indebtedness and took no action to collect it even though he paid Young his salary, totaling \$4,500, after the alleged debt was due (TR. 535).

In February of 1950 Koons requested Young to sign a note for the check for the Jacobs stock transaction. He sent two notes to Young, each in the amount of \$5,983.80. One provided for interest at three percent. The other contained no provision for interest (Tr. 512, 513).

Young did not sign either note (Tr. 510). The Jacobs stock was delivered to Koons and by him given to Young (Tr. 513).

On cross-examination, the witness was asked whether he had bought stock for anyone other than Mr. Young at the time. Objection thereto was sustained and proffer by defense counsel of what was expected to be proved was denied (Tr. 522). Mr. Koons, Mr. Young and Mr. Jacobs, the head of the F. L. Jacobs Company, were friends or acquaintances (Tr. 783, 784). The witness was asked why he did not make the check payable to the broker rather than to cash, and the court refused to permit him to answer it (Tr. 525).

The questions should have been allowed.¹ Their purpose was to show transactions similar to Follansbee (Tr. 533-796). If so found, and considering the stock was in street form and in the possession of Jacobs, there would be no indebtedness until the stock was sold at a loss.

Mr. Capen, the broker, testified that Koons was and had been a good customer of his firm (Tr. 542, 553). On November 13, 1949, at Koons' request, he bought the Jacobs stock for the account of Young (Tr. 544). The stock was delivered to Young in care of Koons. It was put in street form at Koons' request (Tr. 550, 555).

On November 30, 1949, Koons placed for Young with Capen an order for Follansbee Steel stock (Tr. 551), which remained in his office and was never paid for (Tr. 552). It was carried at Koons' request (Tr. 552) in Capen's personal account (Tr. 556). Koons told Capen

¹ cf. *Alford v. U. S.*, 282 U. S. 687, 692, 75 L. Ed. 624, 628; *Lindsey v. U. S.*, 77 U. S. App. D. C. 1, 133 Fed. 2nd. 368.

that he thought the Follansbee stock was going to rise and asked Capen if he would carry some of the stock for him and Young (Tr. 556). He did so. Later it was sold at a profit and Young received from Koons \$1,737.58 (Tr. 556, 557, 796).

Young testified that Jacobs stock transaction resulted from a conference among Jacobs, who was the head of the F. L. Jacobs Company, Koons and Young, all of whom were in Young's office (Tr. 783). He testified that Jacobs said to Koons and him that he felt the position of the Jacobs Company indicated the stock was going to rise (Tr. 783). Koons volunteered that he would buy 1,000 shares for Young (Tr. 783). The stock was bought, delivered by Koons to Young (Tr. 783), and by Young delivered to Jacobs so he could sell it at the appropriate time (Tr. 784). Young never had the stock thereafter nor did he receive dividends thereon (Tr. 784).

Jacobs had the stock at the time Young testified before the subcommittee. At that time, Young did not even think about whether there was a debtor or creditor relationship between him and Koons (Tr. 785). Young said he did not know if he ever considered the stock transaction with Koons as a loan (Tr. 830). He did not consider the stock an asset or a liability (Tr. 850).

Young testified below that every question asked of him by the subcommittee or grand jury he answered to the best of his ability (Tr. 808); and at no time did he decline to answer on the ground of self incrimination (Tr. 808), even though he was advised by the subcommittee counsel that he could do so if the facts warranted it (Tr. 809). This indicates a total lack of motive to lie.

While testifying before the subcommittee, he tried to recall everything purely out of memory of events that had transpired some 16 months before (TR. 830). The circumstances were difficult in view of the television, press, radio and newsreel coverage of the event. He did not have his records but the subcommittee did (TR. 841).

There was no reason for him to state anything that was untrue because the subcommittee could look right at his records (TR. 841, 842). In fact, Senator Douglas had a list of Young's loans in front of him. Young had tried to refresh his memory on everything, even remotely dealing with R. F. C. because that was the purpose of the hearing (TR. 842). On occasion, Senator Douglas refreshed his memory (TR. 843-847).

In preparing his written list of assets and liabilities (Gov. Ex. 14, page 920), he did not have his books, which would have disclosed the Peoples loan. He had requested them (TR. 850-851). The Koons stock transaction was not in his books. He did not consider that either an asset or liability until it was sold (Tr. 850-851).

Motion for finding of acquittal upon count three was made and denied at the close of the Government's case and the entire case (TR. 561, 922, 930).

The appellant contends that the statement "None that I know of, Senator," cannot be perjurious except upon substantial evidence that he did know. Young's answer merely indicates what he remembered at the time. The government had to show that at the time Young was testifying he knew and recalled these alleged debts and that he deliberately withheld them from the subcommittee.

The manner in which the belief of a witness may be established was discussed in *U. S. v. Remington*, 191 Fed. 2nd., 246 (CCA 2nd). The Court said: (Page 249)

"Hence the doctrine that perjury must be proved by the direct testimony of two witnesses or one corroborated witness means that the witness must testify to some 'overt act' from which the jury may 'infer' the accused's actual belief."

In *American Communications Association, etc. v. Douds, et al.*, 339 U. S. 382, 411, 94 L. Ed. 925, 950, the Court, speaking through Chief Justice Vinson, said:

"To state the difference, however, is but to recognize that while objective facts may be proved directly, the state of a man's mind must be inferred from the things he says or does. Of course we agree that the courts cannot 'ascertain the thought that has had no outward manifestation.' But courts and juries every day pass upon knowledge, belief and intent—the state of men's minds—having before them no more than evidence of their words and conduct, from which, in ordinary human experience, mental condition may be inferred. See 2 Wigmore, Evidence 3d ed §§ 244, 256 et seq. False swearing in signing the affidavit must, as in other cases where mental state is in issue, be proved by the outward manifestations of state of mind. In the absence of such manifestations, which are as much 'overt acts' as the act of joining the Communist Party, there can be no successful prosecution for false swearing."

There was no manifestation of Young's mind proved in this case save the Koons stock transaction and the Peoples transaction themselves. Was the matter involved sufficient to impute actual recollection by Young of his alleged indebtedness to Koons and Peoples? We submit not. cf. 2 Wigmore, 3rd Ed. (1940) Sect. 244, 245, 256.

This was an attempt to prove the alleged perjury based upon mental operation and conclusions of the witness by establishing only that the fact or thing testified about occurred. It fails to prove knowledge on Young's part. It does not establish by any outward manifestation that at the time Young testified, he recalled the incidents. A vital link in the chain of proof is missing unless the circumstances of the transactions themselves are enough to permit the jury to infer knowledge. Only Young's transactions with Peoples and Koons were proved. This failed to show that Young, at the time he testified, knew of and mentally recalled the transactions. The charge here is, not that Young had such loans, but that he recalled those loans when he testified before the subcom-

mittee and that he answered "None that I know of" for the purpose of misleading the subcommittee.

Where there is no reason or motive to lie, and such was the case here, the evidence that he knew must be clearly and convincingly proved.¹

In *State v. Lazarus*, 181 Iowa 625, 164 N. W. 1037, 1040, it was said:

"If a man is honestly mistaken as to the existence of a fact, which he affirms to exist, under oath, he cannot be convicted of perjury *upon a mere showing that the fact was other than was stated by him under oath*. It must affirmatively appear that the statement was made wilfully and corruptly for this is an essential element of perjury." (Italics ours)

State v. Dryden, 84 A 1037, 3 Boyce (Del) 466, held that:

"If the answer was in fact untrue, in the sense of being incorrect, but was made without knowledge of its untruth and was made by him in good faith and in the belief of its truth, he cannot be convicted.

"Knowledge is an intangible thing resting in the mind, the possession of which may be admitted by the party, or be shown by proof of facts, circumstances and surroundings from which it may be reasonably and rationally inferred."

The testimony, given by Young to the subcommittee, bared financial and other transactions much more embarrassing than that complained of here. (Gov. Ex. 14, pages 610 to 631; 642 to 644; 706, 733, 823 to 825; 888 to 894; 898 to 901; 913 to 916; 1012 to 1016; 1043 to 1056 and 1061 to 1066). The testimony, considered as a whole, given to the subcommittee by Young shows conclusively that the statement "None that I know of" was not wilfully, knowingly or corruptly false. The evidence was

¹ *State v. Daniels*, 38 S. D. 81, 160 N. W. 723, 725.

insufficient to show that it was. cf. *People v. Gillette*, 111 N.Y.S. 133. 126 App. Div. 665.

A corrupt motive, which is the indispensable essence of perjury, was not present.¹ There was no testimony that Young knew and appreciated his testimony to be false.² The defendant's knowledge and criminal intent was permitted to be ascertained simply because the facts of other loans had actually occurred. Surely, some evidence of recollection was necessary.

In *Fotie v. U. S. (CCA 8th)*, 137 Fed. 2nd. 831, 842, the Court said:

"Necessarily the recollection of a witness must be shown by circumstantial evidence. But it is not enough that the evidence raise an inference of guilt. In view of the requirement that proof of the appellant's recollection of the incident which he denied recollecting must establish the fact of his guilt beyond a reasonable doubt, something more is necessary to convict than proof *that the act, not remembered, did in fact occur*. That is the substance of the proof here." (Italics ours)

That is all the Government proved in the instant case.

Behrle v. United States, supra, was a prosecution for perjury based on the statement of a witness that he did not remember witnessing a shooting and the identity of the culprit, although twice, within a period of five months, he had made a statement and testified as to the facts and circumstances of the shooting and identified the criminal. The Court said:

"The only issue, therefore, in such a case is whether this circumstantial evidence meets the test of proof beyond a reasonable doubt. If it does, it is enough.

¹ *Scott v. Cook*, 62 Ky. 314.

² In re *Priebe*, 207 Minn. 97, 290 N. W. 552, 553; *Lambert v. People*, 76 N. Y. 220.

"Here, as we have seen, appellant in the latter part of July 1936 made a detailed statement to the police of the circumstances of a crime which he had witnessed. Thereafter on several occasions he verified and amplified the statement. On November 17th following he made the same statement on oath to the grand jury, but three weeks later when called to testify in the trial of the persons he had accused, he admitted his signature to the statement but denied any recollection of having made any part of it, or of the events described in it. In short, he 'remembered nothing.' Direct proof that he did remember was impossible. The circumstantial evidence that he *must* have remembered was, if believed, enough to overcome the presumption of innocence and to leave no reasonable doubt of guilt." (Italics ours)

We think the instant case is factually far removed from *Behrle v. U. S.*, *supra*. Behrle had a motive to lie in that he feared retaliation. Young had not made contradictory statements such as Behrle. He had no reason or motive to lie. The dates are also significant. In Behrle, the contradictory statements were made within a period of three weeks. The occurrence was one which would be vividly remembered.

In *People v. Doody*, 172 N. Y. 165, 172, 64 N. E. 807 relied upon in *Behrle v. U. S.*, *supra*, the court held that circumstantial evidence of a defendant's belief would sustain a conviction of perjury where the defendant answered "I do not remember." This also can be distinguished from the instant case and is vastly dissimilar. There, the defendant had testified on several occasions and related incriminating facts against his friend, Fielding. He had given testimony on March 14, 1898, before the grand jury. Several months later, he related the same facts under oath during the trial of Fielding. On April 24, 1899, the same testimony was again given during the trial of other defendants. Later a new trial was granted to Fielding. Doody was elated over the reversal. On December 19, 1899, Fielding was again brought to trial.

While preparing the case for trial, the district attorney inquired about the witness' elation and said that although he could understand it, he was to be called as a witness in the second trial of Fielding. During the second trial, Doody answered that he did not remember the facts he had stated on several occasions before. Upon his conviction, he raised the point that there was no proof that he did remember. However, the Court held a jury question was presented and commented on the fact that only a few days intervened between affirmations and denials.

In the instant case, Young testified as to transactions of many months before. Much had been revealed that was involved and comprehensive. Young's answer that he did not know of other debts is understandable. Further, Young had no motive to lie. Doody did. He was solicitous for his friend. Both Behrle and Doody were testifying in a court room, where we strive to make the atmosphere conducive to disclosure of all the facts. In the instant case, Young was testifying under circumstances destructive of thoughtful consideration and calm reflection. His concentration was affected by the flashing of camera light bulbs, Kleig lights for television, radio microphones and other media of communication (Tr. 866), which was condemned by the District Court in *Kleinman v. U. S.*, 107 F.S., 407, 408.

We submit that a finding of acquittal should have been entered.

COUNT FOUR

The fourth count alleged that the defendant committed perjury on December 17, 1951, before the grand jury of the District of Columbia.

The grand jury was not a competent tribunal for the reasons set forth in point two hereof.

The perjury charge was based upon the following answers to questions propounded to Young by Department of Justice prosecutors then conducting the grand jury proceedings (App. 16A):

"Q. Were you paid by anyone or by any company for any efforts expended in their behalf in putting them in touch with any government employee or official about matters they had before such agencies?

"A. No, sir. The only pay I ever received was in the form of a salary from Lustron and Jacobs. I never received any commissions, anything from any other company at all.

"MR. BEATON: Do you mean from 1948 to the present time?

"THE WITNESS: Yes."

The questions and answers, as originally recorded by the stenographer, appear in Gov. Ex. 8. It will be noted that the initial word "are" was changed to "were".

In whatever wordage the question may have been phrased, it was not simple. It was awkward and confusing. If presented in court, clarification would have been required. The form of the question is not always important. The answer is that which is the essence of the crime. However, in some circumstances, the form of the interrogatory is decisive as to whether false swearing is perjury. *Bishop Cr. Law, 9th Ed., Vol. 2, page 778, sect. 1034 (1923).*

The question propounded to Young attempts to ascertain whether payment was received by him from anyone or any company for putting such person or company in touch with any government employee or official about matters which such person or company had before such agency. Presumably, it meant the department or agency with which the government employee was connected, but it was not so phrased. To found a perjury prosecution upon such a question and the response of the appellant thereto is unfair. What did the experienced Government attorney mean? What was he trying to elicit?

The Government established through Mr. Koons that Young was on the payroll of Charles A. Koons and Company at \$1,500 per month for the months of December 1949, January 1950 and February 1950 (TR. 434). Koons

said that Young was to do as he was told and generally to perform leg work for him in Washington (TR. 437, 514, 805). He also said Young was to contact government agencies (TR. 517). Koons did not think there was any agreement that Young was to sell steel, but he would have been happy if Young had been able to do so (TR. 514, 518).

Koons then stated that the Alien Property Custodian was disposing of the Leitz Company which handled Leica cameras. He asked Young to find out whether it was to be put up for bid or sale and to keep him posted on the situation (TR. 439). Koons might have been interested in the Leitz matter if attractive enough (TR. 530). On February 7, 1950, he wrote to Young, asking him if anything new had developed in the Leitz matter (Gov. Ex. 36).

Literally and legally, this was not putting Koons in touch with the Alien Property Custodian. Rather it was Young himself who was to make the inquiry. There was no evidence that Young put Koons in touch with any government employee or agency. However, Young testified he did nothing on the Leitz matter (TR. 810, 889). The resources of the Department of Justice did not unearth a single witness to show that Young had gone to the Alien Property Custodian. If he had done so, it is reasonable to suppose that the Department would have produced a witness. The corroborative proof, so essential in a perjury case was absent. Further, if the question began with "are," the present was signified. If "were" was the initial word, it meant the past. Young testified on December 17, 1951. He had not been in Koons employ since February 1950.

Koons also testified that he wrote to Young to see what could be done for one Thomas Webber, whose deceased mother had been an employee of the State Department in Mexico. Young was requested to see what could be done to expedite the payment of the accumulated

salary of Webber's mother to Webber (TR. 440, 528). Gov. Ex. 35, a letter from Koons to Young, dated December 21, 1949, advised Young that anything he can do to help Webber settle his mother's estate would be appreciated. Gov. Ex. 35A thanks Young for his help in expediting the matter. Young admitted the receipt of several letters from Koons but stated they were about matters he knew nothing about and he did nothing about them (TR. 805, 810, 889). He specifically stated that nothing was done by him at the State Department on the Webber matter (TR. 820, 889). There was no proof that he did except the inference contained in Gov. Ex. 35A. We submit that in the Webber incident the Government failed to sustain its burden by substantial evidence and again there was a lack of corroboration.¹

Koons also testified that he asked Young if he would contact someone in the personnel office of the E. C. A. (presumably the United States Economic Cooperation Administration, but there was no testimony to that effect) to obtain a position for Mr. Gidera, an employee of Koons, and to ascertain what Gidera had to do to obtain the position (TR. 508, 509). Later, Koons wrote and requested Young to follow up on the Gidera matter (Gov. Ex. 37) (TR. 509). Koons testified this was simply a request of Young to assist someone in getting a job in the government (TR. 528, 529). Young did recall that Koons spoke to him about getting Gidera a job. He advised Koons that he could do nothing about it (TR. 806). Someone did volunteer to do it, but what the outcome was Young did not know (TR. 806).

Young denied in the trial below that he was ever paid by Koons or anyone else except by Jacobs and Lustron for work connected with the government (TR. 801, 806).

¹ The corroboration of the testimony of a single witness should be such that it supplies independent proof of facts inconsistent with the innocence of the accused. *United States v. Hiss*, (CCA 2nd) 185 Fed. 2nd. 822, 824, and authorities therein cited.

He testified that during the grand jury proceedings, upon which this count of the indictment is laid, he told that body that he had worked for Koons (TR. 802, 803, 804). The defendant wished to fortify this statement by the grand jury transcript of testimony but the court below declined to permit him to do so (TR. 803). However, on his cross-examination by Government prosecutors, the court permitted the matter to be shown and developed (TR. 901, to 909)

Perjury is to gauged by the whole of the testimony. *Wharton Cr. Law*, vol. 2, 11th Ed. (1912) page 1719, Sect. 1570.

Young eventually told Koons that he did not see where he was earning his money and their relationship ceased (TR. 807).

Appropriate motion for acquittal was made and denied (TR. 558, 922, 930).

Appellant submits that the testimony upon which the fourth count was based could not sustain a charge of perjury. *Curley v. U.S.*, *supra*; *Weiler v. U.S.*, *supra*; *Fotie v. U.S.* *supra*.

The form of the interrogatory and the defendant's answer thereto are important here. Questions answered in a manner literally and legally correct cannot be the basis of perjury. *U.S. v. Slutzky*, 79 Fed. 2nd. 504, 505 (CCA 3rd). In that case, the bald question was put to the defendant as to whether he had been convicted of a felony. In that particular jurisdiction, there were no felonies as such. Crimes were known as high misdemeanors and misdemeanors. The court said that when the defendant said "no" to the question, his answer was legally truthful and, therefore, he could not be convicted of perjury.

In *Hart v. U. S.*, 131 Fed. 2nd. 59, 61 (CCA 9th), the Court said:

"It has been said 'that to convict of perjury the government must produce testimony of a more direct and positive character than is required to justify a verdict of guilty of other offenses.' *Allen v. United*

States, 4 Cir., 194 F. 664, 668, 39 L.R.A., N.S., 385. If the defendant's answers to questions were legally truthful, she cannot be held for perjury. *United States v. Slutzky*, 3 Cir., 79 F.2d. 504, 505.

In this case, regardless of the form of the question, the record does not indicate that Young put Koons in touch with any government agency. Rather, the most that can be gleaned from Koons' testimony is that Koons asked Young to contact government agencies, while Young was on his payroll.

In *Smith v. U. S.*, 169 Fed. 2nd. 118, 121 (CCA 6th), the Court said:

"Appellant is right in his contention that there can be no lawful conviction in a perjury case when an answer of the defendant, under oath, to a question propounded to him is 'literally accurate, technically responsive, or legally truthful.' It is also true that, to sustain a conviction, it must be shown by clear, convincing and direct evidence to a moral certainty and beyond a reasonable doubt that the defendant committed wilful and corrupt perjury."

Where one testifies literally to a fact or condition, perjury cannot be established.¹

V

The Over Zealousness of the Prosecutor on the Direct Examination of Mr. Steele and Cross-Examination of Defense Witnesses, as Well as His Argument to the Jury, Constituted Misconduct Warranting a New Trial.

During the presentation of the Government's case on count two, the witness Hubert B. Steele testified as to his transactions with Binkley and Young as related in pages 43, 44, et seq., *supra*.

¹ *Pancack v. Commonwealth*, 237 Ky. 1, 34 SW 2nd, 735; *Weiner v. Commonwealth*, 221 Ky. 455, 298, S. W. 1075; *Smith v. State*, 66 Ga. Appeals 671, 19 S. E. 2nd. 170; *The King v. Hayford*, 62 Dom. L.R. 90.

The prosecutor asked the witness, Steele, if the annual retainer of \$7,500 was the whole agreement with Binkley. Steele replied:

“That is the package” (Tr. 362)

Still dissatisfied, the prosecutor pursued the matter and asked of Binkley the following leading and immaterial question:

“Didn’t you have a five percent (5%) arrangement with him?” (Tr. 362)

It obviously suggested, and planted in the minds of the jury, that both Young and Steele were five percenters.

Objection and motion for mistrial was made (Tr. 363). The court stated to the prosecutor that he thought it was improper to bring that out and that he would exclude it.

The notoriety of five percenters as Washington contact men had been critically and adversely publicized. Intimation of Young’s connection with such enterprises and its interjection in the trial below was not only immaterial but was harmful. It could not be remedied by the court’s admonition to the jury to ignore it. It was error for experienced and competent counsel for the Government to develop this when he knew it was improper. In fact, the prosecutor knew the answer would be “yes,” (Tr. 367). It had nothing to do with the perjury charge. It was wholly immaterial. It was highly inflammable and prejudicial.

However, this was not the prosecutor’s only transgression. Young testified under difficult circumstances. He said that his answers to the inquiries by the Senate subcommittee which were made the basis of count three was his best recollection at that time (Tr. 842), and that he had no reason to lie (Tr. 841).

Young was then asked by the prosecutor whether certain Senators at the subcommittee hearing had not charged him with selling influence or attempting to sell influence at the RFC. (Tr. 888).

A motion for mistrial again was made (Tr. 888). The court said:

"That will be denied. I will instruct the jury now. Do not be concerned with anything but what the counts of the indictment allege." (Tr. 888)

It is submitted that the injection by the prosecutor and its patent intimation to the jury that Young was charged by members of the United States Senate with selling influence at the RFC was prejudicial error. It aggravated and intensified the previous testimony as to five percenters. An adverse and prejudicial effect was inevitable.

The times and temper of the people must be considered. The issues of the then recent presidential campaign disclosed to the public the misconduct of persons engaged in selling influence. Emphatic condemnation of the mink coat episodes, deep freezes, five percenters, tax frauds, and other alleged misconduct, had been made.

Many government employees felt that conduct, such as Young was accused of by the committee, reflected upon all of them. Six government employees were on the jury. Resentment and indignation on their part was probable. The impact of these errors was serious.

We submit that what the Senators thought of Young or whether he was selling influence was immaterial. Its introduction into the trial, even though stricken by the court, was prejudicial.

Again the prosecutor in his closing argument to the jury stated as follows:

"And of all things, he forgot recommending a loan of \$10,000,000." (TR. 992)

* * * *

"You wouldn't forget it, particularly you wouldn't forget recommending a \$10,000,000 loan to anybody. You wouldn't forget it particularly, ladies and gentlemen, if you were to get a job with that corporation which was getting the money, at \$12,000.00 a year,

and if within six months you were made vice president of that corporation at \$18,000.00 a year.

"So you just wouldn't forget a thing like that.

"MR. REILLY: It is not our defense that he forgot that \$10,000,000. He serviced it and did not process it." (TR. 994)

The court below took no action on this objection.

Young never even intimated that he had forgotten the \$10,000,000 loan from the RFC to Lustron. His testimony before the subcommittee was that while employed at the RFC, he never had anything to do with Lustron loan applications. He freely admitted below that he serviced the loan (Tr. 756, 757, 837). Such was his testimony before the grand jury (Gov. Ex. 26, pages 11,971, 11,972). The very material distinction between servicing and processing a loan by an examiner at the RFC has been heretofore discussed (See pages 31, 32 supra).

Another material breach of the prosecutor's duty to try the defendant fairly came in his closing argument when he misquoted the evidence. He said (Tr. 1002, 1003):

"But do you remember the first day Mr. Gunderson was in here and the defense is that he had nothing to do with the Lustron loan application. That man sat in that chair and told you categorically, in reply to counsel's questions, that this defendant had nothing to do with the Lustron loan application.

"The next day, when I was cross-examining the man, he receded from that position and told you, in effect, that he did have something to do with it, that his recommendation didn't affect him, but he didn't know what it did to the other four directors.

"He denied that he had made the statement. You remember I had to get the record here and read it to him, that there he had categorically denied just the very thing that they wanted him to say, a director coming down here saying that he had nothing to do with it."

Mr. Gunderson had testified that *so far as he knew*, the defendant had nothing to do with the Lustron application (Tr. 624, 677-680). The prosecutor followed this with a slur on the witness by stating: (Tr. 1003)

"He is a Presidential appointee, Mr. Merl Young brought in, and coincidentally the lawyer that was advising him was another Presidential appointee. You can draw your own conclusions from that."

It was Gunderson's testimony that caused the court below so much concern. It was Gunderson who was characterized by the prosecutor as a perfect defense witness (Tr. 639-640).

Of paramount importance, however, and that which we think was a very serious departure from the standard required of a prosecutor, was the statement in his closing argument: (Tr. 1008-1010)

"The Grand Jury, in conclusion, ladies and gentlemen, they didn't believe him when they said he had nothing to do with these *Lustron applications*. (Italics ours, see foot note 1) Of course the indictment means nothing. That is just a charge. It is a means whereby he is brought into court.

"But the fact remains that his denial there made no impression on the Grand Jury. His denials about the other things made no impression on the Grand Jury. I submit to you, ladies and gentlemen, that while they put on quite a lot of ballyhoo here, the simple facts are that this man falsified his testimony in both places, and that he intentionally did so, and that therefore your verdict should be guilty.

"I ask you ladies and gentlemen to go out and consider the case carefully, and bring back into this court such verdict as you think speaks the truth.

"Thank you.

"MR. REILLY: If the Court please, I would like

¹ Immediately prior to the prosecutor's argument herein complained of, the court had stated to the jury that it was to be concerned with the June 1, 1948, loan of \$10,000,000 only (Tr. 988).

to make one observation to the Court about the statement made by counsel.

"THE COURT: Come to the bench, please.

(At the bench:)

"MR. REILLY: Comment made by counsel for the government to the effect that the Grand Jury didn't believe him was entirely improper. It wasn't based on anything that I said; it wasn't an answer to anything said by the defendant. There is nothing in the record to indicate that that was in the evidence in any manner whatsoever. It should be disregarded.

"THE COURT: I don't know whether it was in the evidence or not, but I assume that his remark was directed to the fact that the indictment was returned even after he testified before the Grand Jury. I assume that is what it was.

"MR. PAISLEY: That is right. He was questioned before the Grand Jury. The jury knows it. It is in evidence.

"THE COURT: I will cover that.

"MR. REILLY: I think that was highly improper and for that reason I move for a mis-trial."

The court did not grant the motion and merely gave the usual charge that an indictment is not evidence (Tr. 1013).

The prosecutor's argument that the Grand Jury did not believe the defendant's testimony and that it had made no impression on that body was a deliberate comment by the prosecutor that an indictment is evidence of guilt. We say deliberate because he twice commented on it. Earlier in his argument, he said: (TR. 996-997)

"They tried to deceive the Committee, *tried to deceive the Grand Jury*, they have tried to deceive you, but they are not going to get away with it in my judgment." (Italics ours)

That an indictment is not evidence is axiomatic. It is a mere formal charge and constitutes no proof of guilt. It does not overcome the presumption of innocence or cause a shift in the burden of proof. To argue, as the

prosecutor herein did at the very end of his closing argument that the trial jury should not believe Young because the Grand Jury did not was error in the following respects:

(a) The prosecution's argument violated the rule that the indictment can never constitute *in any respect* proof of the offense.

(b) The prosecution's argument transgressed the rule that the presumption of innocence continues at all times during the trial.

(c) The argument constituted an unlawful method of attacking the credibility of the defendant.

(d) The argument was based upon the Grand Jury proceedings which were not in evidence and proffered issues which the defendant could not meet without trying collateral matters.

As to (a) above, not only is the indictment not evidence (*Cooper v. U. S.*, 9 Fed. 2nd 216, 226 (CAA 8th); *U. S. v. Schanerman* 150 Fed. 2nd 941, 945 (CCA 3rd); *Nanfito v. U. S.* 20 Fed. 2nd 376, 378, 379 (CCA 8th); *Patterson v. U. S.* 183 Fed. 2nd 687, 690 (CCA 5th)), but the legislature is powerless to make it so (*Tot v. U. S.* 319 U.S. 463, 469, 87 L. Ed. 1519, 1525).

In *Patterson v. U. S.*, *supra*, the conviction was reversed because the Court instructed the jury that the indictment was no evidence of guilt but went on to say:
Page 690

"It has no further force or effect until it is substantiated by competent evidence."

The Court in reversing said:

"It is clear that the appellant was correct in his contention that an indictment in and of itself is never evidence of guilt of the accused and an inference to the contrary having been created by the charge, the appellant was entitled to have the court formulate a correct instruction that would meet defendant's objection."

In the present case, the prosecution's argument conceded that the indictment was only a charge; but, at the same time, utilized the *fact* of the indictment as an argument for conviction by the device of claiming the Grand Jury, in finding the indictment, had obviously refused to believe the defendant's testimony before it. It follows, therefore, that the prosecution drew strength for conviction from the fact of the indictment. The *mode* by which the indictment was utilized, i.e., through the avenue of an attack upon the defendant's credibility does not obscure the basic illegality.

As to (b), the presumption of innocence attends the accused at all times (*U. S. v. Fleischman* 339 U. S. 349, 94 L. Ed. 906; *Curley v. U. S.*, *supra*). Any utilization of the indictment, either as proof or as the basis of an attack upon the credibility of the defendant transgresses this rule. The vice is that a mere charge is made the basis for an argument that the defendant's testimony should not be believed.

(c) The prosecution's argument is an unlawful attack upon the credibility of the defendant. The prosecution's sequence is as follows:

1. The defendant testified before the Grand Jury.
2. The Grand Jury indicted the defendant.
3. Hence, the Grand Jury did not believe the defendant, and hence the trial jury should not believe the defendant.

The unsoundness of this argument is apparent. The trial jury must try the defendant upon the evidence produced before it, not evidence unknown as to quantum, source, coverage, etc. which may have been produced before the grand jury. The prosecution's illogical argument is that because a group of people on a different occasion and upon testimony which was not before the trial jury did not believe the defendant, the trial jury should refuse to believe it. This argument transgresses all known rules covering attacks upon credibility of wit-

nesses. A defendant may be impeached by showing a contradictory statement upon a prior occasion (*3 Wigmore Evidence (3rd Ed.) 1940 Sect. 902, 1017*), but this rule is clearly inapplicable to the present case. The prosecution does not claim the defendant testified differently before the grand jury. The sole reflection upon his testimony is that the grand jury did not believe him. That the grand jury found a charge against him is even less ground for impeachment. A witness cannot be impeached by showing a *charge* of crime; a *conviction* is necessary. (*3 Wigmore Evidence, (3rd Ed.) 1940 Sect. 980, 980A*).

The argument violates the rule that a witness cannot be impeached by matters which would require a collateral inquiry. Veracity cannot be attacked by showing that another or others did not believe the defendant on a prior occasion. Only his reputation for veracity is admissible. (*3 Wigmore Evidence (3rd. Ed.) 1940 (Sects. 923, 924; cf. Sect. 1608)*).

The prosecution's argument, coming at the very close of the case, was utterly untenable and unfair. Its effect upon the jury can readily be visualized. No more telling argument could be made than to claim that inasmuch as the grand jury refused to believe the defendant, the trial jury should likewise refuse to believe him. The prosecution's argument, which to trained legal minds is a *non sequitur*, might shape up to a jury as the soundest logic.

Further, the unjustifiable reflection upon two of the defendant's witnesses as Presidential appointees and arguing that the jury could draw their own conclusions as to that (TR. 1003) plainly called to the jury's mind the alleged misconduct of some persons in the earlier administration. During the 1948 presidential campaign, Merl Young had worked at Democratic National Headquarters (TR. 820, 872, 873). The mink coat permeated the trial. The Government counsel's statement to the jury that he had studiously avoided the mink coat (TR.

1005) was not the fact. The Government referred to the coat several times (TR. 9, 94, 846, 945).

In *Pierce v. U. S.* 86 Fed. 2nd, 949 (CCA 6th), the prosecutor by improper questions conveyed to the jury suggestions that the defendant had been tried in the Federal Court of Alabama; that his credit was bad and that he could not get certain character testimony.

The Court said: *Pages 952-953*

"The inquiry, however, must always be as to whether in view of the whole record the impression conveyed to the minds of the jurors by irrelevant and prejudicial matter is such that the court may fairly say that it has not been successfully eradicated by the rulings of the trial judge, his admonition to counsel, and his instruction to the jurors to disregard it. Sometimes a single misstep on the part of the prosecutor may be so destructive of the right of a defendant to a fair trial that reversal must follow, as in *Pharr v. United States*, 48 F. (2d) 767 (C.C.A. 6). At other times transgressions may be so slight that if promptly corrected and their repetition avoided the court may not say that the jury was prejudiced, though often the mere cumulative effect of a course of improper conduct compels reversal. *Volkmer v. United States*, 13 F. (2d) 594 (C.C.A. 6); *Frantz v. United States*, 62 F. (2d) 737 (C.C.A. 6)."

* * * *

"It is quite true that the court ruled correctly upon all objections interposed by the defendants, but in most instances the ruling came after the mischief had been done, and it was clearly a case where the misconduct of the prosecutors was neither slight nor confined to a single instance, but so pronounced and persistent that the cumulative effect upon the jury cannot be disregarded as inconsequential. *Berger v. United States*, 295 U.S. 78, 89, 55 S.Ct. 629, 632, 79 L. Ed. 1314."

The prosecutor's argument falls within the ambit of conduct condemned by the Supreme Court and this Court in *McFarland v. U. S.*, 80 U.S. App. D.C. 196, 150 Fed.

2nd 593; *Viereck v. U. S.* 76 U.S. App. D.C. 262, 130 Fed. 2nd 945, 962, 316 U.S. 236, 247, 87 L. Ed. 734, 741; and *Berger v. U. S.* 295 U.S. 78, 88, 79 L. Ed. 1314, 1321, as well as *Pickford v. Hudson*, 32 App. D.C., 480, 489. See also *Volkmar v. U. S.* (CCA 6th), 13 F(2) 594, 595; *Latham v. U. S.*, 226 F. 420 (CCA 5th), 53 Am. Jur. page 385, Sect. 480 et seq.

We submit that in a case such as this the interjection of the irrelevant, immaterial and highly inflammable matter of five-percenters as well as the suggestion that some of the Senators on the subcommittee charged that Young was selling his influence at the RFC, resulted in a miscarriage of justice.¹ Both questions were highly leading. The exclusion of the answers did not correct the mischief which had been done. The cumulative effect of the foregoing conduct of the prosecutor constituted serious and prejudicial error.

CONCLUSION

It is submitted that the judgment below should be reversed with appropriate instruction to dismiss, or enter judgment of acquittal or grant a new trial.

JAMES F. REILLY

HARRY A. CALEVAS

Attorneys for Appellant

821 15th Street, N. W.

Washington 5, D. C.

¹ *Glasser v. U. S.*, 315 U. S., 60, 93, 86 L. Ed. 680, 697, 698, also comment of trial court and prosecutor Tr. 639, 640.

APPENDIX

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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 11,782

E. MEEL YOUNG, *Appellant*,

v.

UNITED STATES OF AMERICA, *Appellee*.

Appeal from the United States District Court
for the District of Columbia

JOINT APPENDIX

1265

CRIMINAL DOCKET

United States District Court for the District of Columbia

Parties

UNITED STATES

vs.

E. MERL YOUNG

CASE CLOSED

Attorneys

U. S. Attorney
 William A. Kehoe, Jr.
 Vernon W. Turner

G. J. No. Orig.

Criminal No. 355—'52

Charges: PERJURY (22 D.C.C. 2501

Bond: \$1000.00 I. B. Jones

*Date**Proceedings*

1952 Feb 28	presentment and Indictment filed (4 counts)
Mar 14	ARRAIGNED, Plea NOT GUILTY entered, 20 days, etc. Bond fixed by Court at \$1,000.00. Defendant to remain in custody of attorney pending making bond. Attorney William A. Kehoe, Jr. present. TAMM, J. Cert. filed 3/17/52
Mar 14	RECOGNIZANCE in the sum of \$1000.00 taken with I. B. Jones, Surety, filed.
21	Appearance Vernon W. Turner entered, filed.

Apr 3 Motion of defendant for discovery and inspection and points and authorities in support thereof, filed.

Motion of defendant for Bill of Particulars and points and authorities in support thereof, filed.

Motion of defendant to dismiss and points and authorities in support thereof, filed.

Motion of defendant for election and points and authorities in support thereof, filed.

18 Government's Points and Authorities in Opposition to Motion to Dismiss, filed.

Government's Points and Authorities in Opposition to Defendant's Motion for Election, filed.

29 Motion to dismiss argued and submitted. Attorney William A. Kehoe, Jr. present. SCHWEINHAUT, J. Cert. filed.

May 14 Defendant's Supplemental Motion to dismiss and points and authorities in support thereof, filed.

1266 Supplemental Page No. 1

Date

Proceedings

1952 Dec 23 Motions heretofore argued and submitted to dismiss and to elect and for discovery and inspection denied. SCHWEINHAUT, J.

Motion for bill of particulars denied. SCHWEINHAUT, J.

1953 Jan 2 Motion of defendant for leave to file Second Supplemental motion to dismiss, Exhibit "A" and points and authorities in support thereof, filed.

Cert. of Serv.

Motion of deft. for reconsideration of defendant's motion to dismiss; for bill particulars, for an election and for discovery and inspection, and Points & Authorities in support thereof, filed.

Cert. of Serv.

- 22 Government's Points & Authorities in opposition to motion for leave to file second supplemental motion to dismiss, filed. Cert. of Serv.

- 23 Motion for leave to file second motion to dismiss denied.

Motion for reconsideration of motion to miss and for bill of particulars denied.

Motion for an election and for discovery and inspection denied.

Motion for bill of particulars filed April 3, 1952 granted in part. Attorney William A. Kehoe, Jr. present.

SCHWEINHAUT, J. (Reporter—Surplice)

- Feb 19 Bill of particulars, Exhibits Letter Pages A thru Z, Pages A-1 thru Z-1, Pages A-2 thru T-2, Pages 1 thru 45, filed.

- Mar 10 Praeipe withdrawing appearance of William A. Kehoe, Jr. as counsel to defend, filed. Fiat-McGuire, J.

Supplemental Bill of Particulars, filed. Cert. of Serv.

- 20 Appearance James F. Reilly entered, filed.

- 23 JURORS SWORN on Voir Dire; JURY SWORN:

Delilah A. E. Allen	Eileen E. Darragh
Joseph F. Bailey	Marie H. Gorman
John G. Jameson	William R. Griffith
Gloria B. Bianchini	Floyd G. Keeton
Frederick S. Butler	Lois A. Hoover
Beatrice J. Kegley	John G. Kibsey, Jr.

5 A

Alternate Juror Sworn: Gertrude F. Kluge

Case respited until tomorrow morning; Attorneys James F. Reilly, Harry A. Calevas, Vernon W. Turner present. McGUIRE, J. Cert. filed. (Reporter—O'Neal)

24 TRIAL RESUMED, Same Jury.

Case respited until tomorrow morning; Attorneys James F. Reilly, Harry A. Calevas, Vernon W. Turner, present. McGUIRE, J. Cert. filed. (Reporter—O'Neal)

1267

Supplemental Page No. 2

Date

Proceedings

1953 Mar 25 TRIAL RESUMED, Juror No. 11, Lois A. Hoover, being unable to perform her duties as a juror is excused by the Court from further jury duty in this case; Alternate Juror, Gertrude F. Kluge, takes seat No. 11 in the jury box; Case respited until tomorrow morning; Attorneys James F. Reilly, Harry A. Calevas, Vernon W. Turner present. McGUIRE, J. Cert. filed. (Reporter—O'Neal)

26 TRIAL RESUMED, Same Jury; Case respited until tomorrow morning; Attorneys James F. Reilly, Harry A. Calevas, Vernon W. Turner, present. McGUIRE, J. Cert. filed. (Reporter—Monick)

27 TRIAL RESUMED, Same Jury; Case respited until the meeting of the Court; Monday Morning, March 30, 1953; At-

torneys James F. Reilly, Harry A. Calevas, Vernon W. Turner present. McGuire, J. (Reporter—Monick) Cert. filed.

30 TRIAL RESUMED, Same Jury; Case respited until the meeting of Court tomorrow morning; Attorneys James F. Reilly, Harry A. Calevas, Vernon W. Turner present. McGUIRE, J. Cert. filed. (Reporter—Monick)

30 TRIAL RESUMED, Same Jury; Case respited until the meeting of Court tomorrow morning; Attorneys James F. Reilly, Harry A. Calevas, Vernon W. Turner present. McGUIRE, J. Cert. filed. (Reporter—Monick)

31 TRIAL RESUMED, Same Jury; VERDICT—GUILTY as indicted; Jury Polled; Case referred to the Probation Officer of the Court; Defendant permitted to remain on bond pending sentence; Defendant's prayers, filed. Memorandum of defendant on jurisdiction of Senate Committees, filed. Attorneys James F. Reilly, Harry A. Calevas, Vernon W. Turner, present. McGUIRE, J. Cert. filed. (Reporter—Monick)

Apr 3 Motion of defendant for new trial, filed. Cert. of Serv.

6 Motion of defendant for acquittal. Cert. of Serv.

24 Motion of defendant for a new trial and for acquittal, heard, argued and taken under advisement. Attorney James F. Reilly present. McGUIRE, J. Cert. filed. (Reporter—Watson)

- 29 Memorandum Opinion Denying on all grounds the Motion for New Trial, filed. McGUIRE, J.

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Supplemental Page No. 3

*Date**Proceedings*

- 1953 Apr 30 SENTENCED to Imprisonment for a period of Four (4) months to Two (2) years on count one; Four (4) months to Two (2) years on counts two, three, four; the sentences imposed on counts two, three, four to run concurrently with the sentence imposed on count one; Defendant committed to District of Columbia Jail. Commitment issued. Attorney James F. Reilly present. McGUIRE, J. (Reporter—Watson) Judgment and commitment, filed. McGUIRE, J.
- 30 Notice of Appeal, filed. Clerk's Fee \$5.00 paid and credited to U. S.
- May 7 Certified copy of Order from the U. S. Court of Appeals for the District of Columbia Circuit, admitting the appellant, E. Merl Young to bail pending disposition of the appeal upon his filing in the Court of Appeals of a bond in the penal sum of Two Thousand (\$2,000.00) with surety to be approved by the Clerk of the Court of Appeals, or upon furnishing to the Clerk of the U. S. District Court \$2,000.00 in cash or bonds or notes of the U. S., and executing a bond for his appearance, pursuant to Rule 46 (d) of the Federal Rules of Criminal Procedure, filed.

- 14 Transcript of proceedings, April 24, 1953,
Pages 1 thru 56, filed. (Court Files)
(Reporter—Watson)
Transcript of proceedings, April 30, 1953,
Pages 1 thru 7, filed. (Court Files)
(Reporter—Watson)
 - 18 Designation of Record, filed.
Transcript of Proceedings, Monday 3/23/
53 Cross-numbered 1-150; Tuesday 3/
24/53, Pages 151, 152 and 201; Wed-
nesday 3/25/53 Cross-numbered 301-
500; filed. (Appellant's Copy) (Re-
porter—O'Neal)
Transcript of proceedings, Thursday 3/
26/53, Pages 501-664; 3/27/53 Pages
665-816; 3/30/53 Pages 817-989; 3/31/
53 Pages 990-1040; filed. (Reporter—
Ace Reporting Co.) (Appellant's Copy)
Transcript of proceedings, 4/24/53 Pages
1-56; 4/30/53 Pages 1-7, filed. (Re-
porter—Watson) (Appellant's Copy)
 - 19 Order for transmission of original papers
and exhibits as designated, filed. Mc-
GUIRE, J. (N)
 - 27 Counter-Designation of record, filed. Cert.
of Serv.
 - Jun 2 Motion of defendant to extend time for fil-
ing the record and docketing the ap-
peal herein, filed. Cert. of Serv.
Order extending time to file record on ap-
peal to and including August 3, 1953,
filed. McGUIRE, J.
- Supplemental Page No. 4

<i>Date</i>	<i>Proceedings</i>
1953 Jun 3	Government's exhibits 1 thru 40 including 35-A and B and 38-A and B, filed. Defendant's exhibits 2 thru 8-B, filed.
4	Order granting leave to reporter to physically withdraw transcript from file, filed. McGUIRE, J.
	Receipt of Court Reporter— Thomas O'Neal, filed.
8	Transcript of proceedings, Monday, March 23, 1953 Pages 1-150, Tuesday, March 24, 1953, Pages 151-300, Wednesday, March 25, 1953, Pages 301-500, Thursday, March 26, 1953, Pages 501-664, Friday, March 27, 1953, Pages 665-816, Monday, March 30, 1953, Pages 817-989, Tuesday, March 31, 1953, Pages 990-1040, filed. (Court copy) (Reporter—O'Neal)
Jul 30	Motion to extend time for filing the record and docketing the appeal herein, filed. ORDER extending time to file record on Appeal to and including August 20, 1953, filed. KEECH, J.

1106

Filed In Open Court

Feb 28 1952 Harry M. Hull, Clerk

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA
HOLDING A CRIMINAL TERM

Grand Jury Impanelled on March 6, 1951,
sworn in on March 7, 1951.

THE UNITED STATES OF AMERICA

vs.

E. MERL YOUNG, Defendant.

Criminal No. 355-'52

Grand Jury Original

Perjury (Title 22 Section 2501)

District of Columbia Code,

1940 ed.

The Grand Jury charges:

1. That, on or about the 21st day of February, 1951, at the City of Washington, District of Columbia, and within the jurisdiction of this Court, E. MERL YOUNG, the defendant herein, having duly taken an oath in a matter before a competent tribunal, in which a law of the United States authorizes an oath to be administered, to wit, the Subcommittee of the Committee on Banking and Currency, United States Senate, inquiring into and conducting a study of the operations of the Reconstruction Finance Corporation, an agency of the United States of America, pursuant to Senate Resolution 219, dated February 8, 1950, extended by S. Res. 279, dated May 19, 1950, and by S. Res. 307, dated July 13, 1950, Eighty-First Congress, Second Session, and S. Res. 17, dated January 29, 1951, Eighty-Second Congress, First Session, that he would testify truly, did unlawfully, knowingly and willfully, and contrary to said oath, state material matter which he did not believe to be true, that is to say:

2. That, at the time and place aforesaid the Subcommittee of the Committee on Banking and Currency of the United States Senate was conducting an investigation entitled A Study of the Operations of the Reconstruction Finance Corporation, pursuant to Senate Resolution 219, described in paragraph 1. It was part of the Subcommittee's functions to inquire into the operations of the

1107 aforesaid Reconstruction Finance Corporation and its subsidiaries with special attention given to the recommendations of the Commission on Organization of the Executive Branch of the Government with respect to such corporation and its subsidiaries. During the course of the Subcommittee's hearings, aforesaid, it became material to determine whether the defendant, E. MERL YOUNG, while in the employ of the Reconstruction Finance Corporation, had participated in any manner in the processing of the loan applications of the Lustron Corporation pending before the Reconstruction Finance Corporation.

3. That, at the time and place aforesaid, the defendant, E. MERL YOUNG, appeared as a witness before the aforesaid Subcommittee of the Committee on Banking and Currency, United States Senate, and then and there being under oath as aforesaid, testified falsely before said Subcommittee with respect to the aforesaid material matter as follows:

"While I was employed by the Reconstruction Finance Corporation I never had anything to do with the loan applications made by Lustron."

That the aforesaid testimony of the defendant, as he then and there well knew and believed, was not true in that the defendant, E. MERL YOUNG, did participate, in his official capacity, in the processing and consideration of a loan application made by the Lustron Corporation, Columbus, Ohio, with the said Reconstruction Finance Corporation.

Second Count

1. The Grand Jury re-alleges all of the allegations of paragraph 1 of the First Count of this indictment.

2. That, on or about February 21, 1951 and at the place aforesaid the Subcommittee of the Committee on Banking and Currency of the United States Senate was

conducting an investigation entitled A Study of the Operations of the Reconstruction Finance Corporation, pursuant to Senate Resolution 219, described in paragraph 1 of the First Count of this indictment. It was part of the Subcommittee's functions to inquire into the operations of the aforesaid Reconstruction Finance Corporation and its subsidiaries with special attention given to the recommendations of the Commission on Organization of the Executive Branch of the Government with respect to such corporation and its subsidiaries.

During the course of the Subcommittee's hearings, aforesaid, it became material to determine the nature and extent of the contacts, transactions, dealings and associations of the defendant, E. MERL YOUNG, with officials and directors of the Reconstruction Finance Corporation and whether the defendant, E. MERL YOUNG, had received directly or indirectly, or by any manner or means, compensation, moneys, fees, gifts, payments, loans or anything of value from any person, partnership, corporation, association or business entity, or official or representative thereof, in connection with the said defendant's representation or performance of services in behalf of any person, partnership, corporation, association or business entity or official or representative thereof, before the Reconstruction Finance Corporation.

3. That, at the time and place aforesaid, the defendant, E. MERL YOUNG, appeared as a witness before the aforesaid Subcommittee of the Committee on Banking and Currency, United States Senate, and then and there being under oath as aforesaid, testified falsely before said Subcommittee with respect to the aforesaid material matter as follows:

"All my income since leaving Government employ has been in the form of salaries from employers or advances from companies in which I owned an interest. I have

never received 1 cent in the form of fees or commissions from anyone."

That the aforesaid testimony of the defendant, as he then and there well knew and believed, was not true in that the defendant, E. MERL YOUNG, did receive a fee, in the amount of \$312.50 from the partnership of Ribenack and Steele, of Washington, D. C., a partnership in which he was not a partner, in which he did not own an interest, and by whom he was not employed on a salary, pursuant to an agreement by and between the said defendant, E. MERL YOUNG, and Hubert Steele, a partner of the aforesaid firm of Ribenack and Steele, that the said defendant, E. MERL YOUNG, would assist the said Hubert Steele in rendering services to the Binkley Manufacturing Company, a borrower from the Reconstruction Finance Corporation and a client of the aforesaid firm of Ribenack and Steele.

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Third Count

1. The Grand Jury re-alleges all of the allegations of paragraph 1 of the First Count of this indictment, except the allegation as to the date February 21, 1951, substituting therefor the date February 27, 1951.

2. That, on or about February 27, 1951, and at the place aforesaid the Subcommittee of the Committee on Banking and Currency of the United States Senate was conducting an investigation entitled A Study of the Operations of the Reconstruction Finance Corporation, pursuant to Senate Resolution 219, described in paragraph 1 of the First Count of this indictment. It was part of the Subcommittee's functions to inquire into the operations of the aforesaid Reconstruction Finance Corporation and its subsidiaries with special attention given to the recommendations of the Commission on Organization of the Executive Branch of the Government with respect to such corporation and its subsidiaries. During the course of

the Subcommittee's hearings, aforesaid, it became material to determine whether the defendant, E. MERL YOUNG, had received directly or indirectly, or by any manner or means, compensation, moneys, fees, gifts, payments, loans or anything of value from any person, partnership, corporation, association or business entity, or official or representative thereof, not only during the period of his employment by the Reconstruction Finance Corporation but also thereafter.

3. That, at the time and place aforesaid, the defendant, E. MERL YOUNG, appeared as a witness before the aforesaid Subcommittee of the Committee on Banking and Currency, United States Senate, and then and there being under oath as aforesaid, testified falsely before said Subcommittee with respect to the aforesaid material matter as follows:

"Senator Douglas. Now, Mr. Young, we do not want to pry unduly into your financial affairs, but it would seem to me that you have made some pretty loans, if I may say so. If I were your investment counselor—

"Mr. Young. I would say so, too, Senator.

"Senator Douglas. You borrowed \$32,000 from the Atlantic Basin Company for your house, and that loan was given to you through the instance of Mr. Rosenbaum; is that not true?

1110 "Mr. Young. Yes, sir.

"Senator Douglas. You borrowed a little over \$7500 from Mr. Rosenbaum on account of the fur coat and you borrowed \$8500 from the firm of L. N. Rosenbaum for the brewery.

"Mr. Young. Yes, sir.

"Senator Douglas. And the F. L. Jacobs Company, you borrowed \$120,000, on your account \$30,000. Are there any others?

"Mr. Young. None that I know of, Senator."

That the aforesaid testimony of the defendant, E. MERL YOUNG, as he then and there well knew and believed, was not true, in that the defendant, E. MERL YOUNG, was then and there indebted to Wesley J. Peoples and to Charles A. Koons & Company for loans of money theretofore borrowed by E. MERL YOUNG from the said Wesley J. Peoples and from the said Charles A. Koons & Company which said loans were, at the time aforesaid, then due, owing and unpaid.

Fourth Count

1. That, on or about the 17th day of December 1951, at the City of Washington, District of Columbia, and within the jurisdiction of this Court, E. MERL YOUNG, the defendant herein, having duly taken an oath before a competent tribunal, to wit, the Grand Jurors of the United States of America, duly impanelled and sworn in the District Court of the United States for the District of Columbia, and inquiring for that District in a matter then and there pending before said Grand Jurors in which a law of the United States authorizes an oath to be administered, that he would testify truly, did unlawfully, knowingly and willfully, and contrary to said oath, state material matter which he did not believe to be true, that is to say:

2. That, at the time and place aforesaid the Grand Jurors inquiring as aforesaid, were conducting an investigation to determine whether there were violations of the Bribery, Perjury, Fraud and False Statements, and Conspiracy laws of the United States of America and any other Federal Criminal Statute, and it was material to said investigation to ascertain whether the said de-

1111 fendant had received directly or indirectly, or by any manner or means, compensation, moneys, fees, gifts, payments, loans or anything of value from any person, partnership, corporation, association or business entity, or official or representative thereof, not only during the period of his employment by the Reconstruction Finance Corporation but also thereafter.

3. That, at the time and place aforesaid, the defendant, E. MERL YOUNG, appeared as a witness before the aforesaid Grand Jurors, and then and there being under oath as aforesaid, testified falsely before said Grand Jurors with respect to the aforesaid material matters as follows:

“Q. Were you paid by anyone or by any company for any efforts expended in their behalf in putting them in touch with any government employee or official about matters they had before such agencies?

A. No, sir. The only pay I ever received was in the form of a salary from Lustron and Jacobs. I never received any commissions, anything from any other company at all.

MR. BEATON: Do you mean from 1948 to the present time?

THE WITNESS: Yes.”

1112 That the aforesaid testimony of the defendant, as he then and there well knew and believed, was not true in that the defendant, E. MERL YOUNG, had received salary payment from Charles A. Koons & Company at the rate of \$1500 per month from December 1, 1949 through February 1950.

* * * *

1114 Filed Apr 3 1952 Harry M. Hull, Clerk

Motion To Dismiss

Comes now the defendant, E. Merl Young, by his attorneys, and withdrawing his plea of not guilty heretofore entered herein, moves that the indictment herein be dismissed in that it is bad in substance and in law on the following grounds:

Invalidity of Indictment As A Whole

1. The indictment and all counts thereof should be dismissed on the ground that the Grand Jury finding and returning the same was illegally summoned and constituted in that there is no certificate in writing by the United States Attorney to the Chief Judge of the Court, or in his absence, the senior associate justice, that the exigencies of the public service or the public interest required an additional Grand Jury, nor is there any order of Court, made in its discretion, summoning the said Grand Jury.

2. The Grand Jury that returned the indictment herein was not selected, drawn or impaneled in the manner provided for by law, in that two of the three jury commissioners who drew and selected the Grand Jury had not at the time of so doing taken the oath of office as prescribed by law, to defendant's detriment. Further, the jury commissioners were not appointed in accordance with statutory requirements in that two members thereof were appointed the same year. Accordingly, the indictment is void.

3. This defendant's right to an impartial consideration of his case by the Grand Jury was prejudiced by the fact that eleven of the twenty-three jurors were Government employees; that eight Government attorneys appeared before that body; and that the Grand Jury had before it during the consideration of this case at least

two reports of the Senate Subcommittee, which is
1115 the actual prosecutor, in which reports this defendant was unfairly and unjustly criticized.

4. This indictment and all counts thereof are vitiated by the appearance of unauthorized persons before the Grand Jury during its consideration of this case.

Count One

5. Defendant moves to dismiss Count 1 of the indictment in that it is so vague and indefinite and lacking in essential averments as not to charge an offense in that:

(a) There is no allegation of the officer or person who administered the oath, or of his authority to do so;

(b) There is no allegation of essential facts showing that defendant's alleged statements constituted a material matter to the inquiry; there is no showing as to the Recommendations of the Commission on Organization of the Executive Branch of the Government, where such recommendations can be found, what particular recommendations the Grand Jury, the Senate or its Subcommittee had in mind, nor is there any showing in what way defendant's having anything to do with a Lustron application was material vel non.

6. Defendant moves to dismiss Count 1 of the indictment in that there is a failure of allegation that a quorum of the Subcommittee was present at the time the oath was administered and at the times of the alleged testimony, and on the further fact that there was no proof before the Grand Jury that a quorum was in fact present, and that the subcommittee was a competent tribunal. Further, this count of the indictment does not show that the Subcommittee was sitting in compliance with the rules of the Senate and was legally functioning at the time the defendant testified.

7. The first count of the indictment shows on its face that the testimony in question does not relate to a legislative purpose, in that all legislative questions pertaining to the subject matter had already been determined and published. The hearings were called by the subcommittee to accord "the opportunity for a public 1116 hearing to those who feel that unfair injury has been given.", and not for a legislative purpose. A voluntary statement by the defendant was not made for a legislative purpose and none of the questions asked was material to pending legislation.

8. The charging part of Count 1 is vague and indefinite and lacking in essential elements in that there is no averment that the testimony which is the premise of the charge was given willfully and contrary to his oath.

9. Count 1 is fatally defective and must be dismissed for the reason that there was no competent evidence of the offense charged presented to the Grand Jury during its investigation of this case.

Count Two

10. The defendant makes a part hereof paragraphs 4, 5, 6, 7, 8 and 9 inclusive dealing with Count 1.

Count Three

11. The defendant moves to dismiss Count 3 of the indictment in that it is so vague and indefinite and lacking in essential averments as not to charge an offense in that:

(a) There is no allegation of the officer or person who administered the oath, or of his authority to do so;

(b) There is no allegation of essential facts showing that defendant's alleged statements constituted a material matter to the inquiry; there is no showing as to the Rec-

ommendations of the Commission on Organization of the Executive Branch of the Government, or where such recommendations can be found, or what particular recommendations the Grand Jury, the Senate or its subcommittee had in mind.

12. Defendant moves to dismiss Count 3, in that there is a failure of allegation that a quorum of the Subcommittee was present at the time the oath was administered and at the time of the alleged testimony, and on the further ground that there was no proof before the Grand Jury that a quorum was in fact present, and that the Subcommittee was a competent tribunal. Further, this count of the indictment does not show that the Subcommittee was sitting in compliance with the rules of the
1117 Senate and was legally functioning at the time the defendant testified.

13. The third count of the indictment shows on its face that the testimony in question does not relate to a legislative purpose, in that all legislative questions pertaining to the subject matter had already been determined and published. The hearings were called by the Subcommittee to record "the opportunity for a public hearing to those who feel that unfair injury has been given".

14. The matters set forth in Count 3 in haec verba show on their face that they are not statements of fact but statements of recollection based on memory and, as such, cannot be used as basis for a charge of perjury. Likewise, the matters set forth in Count 3 are lifted from their context and the context shows that the accused was testifying fully and completely to all questions pro-founded.

15. The charging part of Count 3 is vague and indefinite and lacking in essential elements in that there is no averment the testimony which is the premise of the

charge was given willfully and contrary to defendant's oath.

16. Count 3 is likewise defective and must be dismissed for the reason that there was no competent evidence of the offense charged presented to the Grand Jury during its investigation of this case.

Count Four

17. The defendant moves to dismiss Count 4 on the ground that the Grand Jury before whom the alleged testimony was given was not a competent tribunal within the meaning of D. C. Code 22-2501 in that the Grand Jury was illegally summoned and there is no certificate in writing by the United States Attorney to the Chief Judge of the Court, or in his absence, the senior associate justice, that the exigencies of the public service or the public interest required an additional Grand Jury, nor is there any order of Court, made in its discretion, summoning the said Grand Jury.

18. The Grand Jury before whom the alleged testimony was given was not a competent tribunal within the meaning of D. C. Code 22-2501 in that the Grand Jury was not selected, drawn or impaneled in the manner provided for by law.

1118 19. Count 4 of the indictment shows on its face that the question asked of the defendant was not material to the investigation being conducted by the Grand Jury.

20. The charging part of Count 4 is lacking in essential elements in that there is no averment that the testimony which is the premise of the charge was given willfully and contrary to defendant's oath.

21. In Count 4 the alleged false statement or statements are set out in haec verba, and these statements are not falsified in the last paragraph of this count. The

charge of falsification is not co-extensive with defendant's statement, and the traverse of the statement does not set forth the essential averment that the salary payment received from Charles A. Koons and Company was for efforts expended "in putting them in touch with any government employee or official about matters they had before such agencies."

22. This count is vitiated by the appearance of unauthorized persons before the Grand Jury during its consideration of this matter.

WHEREFORE, on the above grounds and for such other as appear on the face of the indictment or may be argued at the hearing itself, defendant prays that the indictment herein and each count thereof be dismissed.

Oral argument is requested.

* * * *

1119 Filed May 14 1952 Harry M. Hull, Clerk

Supplemental Motion To Dismiss

Comes now the defendant, E. Merl Young, by his attorneys, and by leave of Court previously granted, moves that the indictment herein be dismissed for the following additional reason:

1. Count 4 of the indictment is bad in substance and in law in that the alleged false statements set forth in haec verba in Count 4 were lifted from their context and the context shows that the accused was testifying truly and completely to all questions propounded.

* * * *

1120 Filed Dec 23 1952 Harry M. Hull, Clerk

On this 23rd day of December, 1952, the Motions to Dismiss and to Elect and for Discovery and Inspection, heretofore argued and submitted are each denied.

The defendant's motion for a Bill of Particulars is denied.

By direction of Henry A. Schweinhaut Presiding Judge Criminal Court # Five.

* * * *

1121 Filed Jan 2 1953 Harry M. Hull, Clerk

Motion For Leave To File Second Supplemental Motion To Dismiss

Comes now the defendant, E. Merl Young, by his attorneys, and moves the Court for leave to file Second Supplemental Motion To Dismiss, a copy of which, with Points and Authorities in Support thereof, is attached hereto as Exhibit A and is prayed to be read as a part hereof as though fully set forth herein. In support of this motion defendant states as follows:

1. That on or about November 20, 1952 counsel for defendant learned of the improper systematic exclusion of qualified residents of the District of Columbia from the jury lists, which forms the basis of the Second Supplemental Motion To Dismiss, at which time there were still awaiting decision other previously filed motions, including a Motion To Dismiss, which had been heard sometime in April, 1952.

2. That there is still pending before the Court in this case a Supplemental Motion To Dismiss, which was filed on or about May 14, 1952, pursuant to leave previously granted by the Court. That said Supplemental Motion To Dismiss has not been heard by the Court, nor has any

date been set for argument; that hearing of the attached Second Supplemental Motion To Dismiss will not delay the consideration of this cause.

3. That the proper administration of justice in the District of Columbia and the rights of this defendant warrant a hearing and determination of the matters which are raised by the attached Second Supplemental Motion To Dismiss; and that it is the conviction and belief of this defendant that a proper determination of the matters raised in the Second Supplemental Motion To Dismiss will result in a dismissal of the indictment herein and obviate the necessity of a long, protracted and expensive trial.

• • • •

1123 Filed Jan 2 1952 Harry M. Hull, Clerk

Second Supplemental Motion To Dismiss

Comes now the defendant, E. Merl Young, by his attorneys, and without waiving any other motion heretofore by him filed, moves that the indictment herein be dismissed in that it is bad in substance and in law on the following grounds:

1. The indictment and all counts thereof should be dismissed on the ground that the Grand Jury finding and returning the same was illegally constituted in that there was an illegal systematic and intentional exclusion of properly qualified residents of the District of Columbia from the Grand Jury.

2. The indictment is illegal and void in that residents of the District of Columbia, properly qualified for jury service in said District, were systematically excluded from jury service in the District of Columbia and more particularly were systematically excluded from serving on the Grand Jury which returned the instant indictment

for the sole and immaterial reason that they exercised voting privileges elsewhere.

3. The indictment is illegal and void and deprives the defendant of the rights guaranteed by the Fifth Amendment to the Constitution in that the Grand Jurors returning same did not represent a proper cross-section of the residents of the District of Columbia.

4. The indictment is illegal and void in that the Grand Jury returning the same was not selected pursuant to the requirements of the applicable laws in force and effect in this jurisdiction.

1124 In support of this motion the defendant states that for the past several years it has been the practice of the jury commission for the District of Columbia to issue questionnaires to prospective jurors; that one of the questions appearing on said questionnaire asks whether the prospective juror votes in any other jurisdiction; that it has been the uniform practice of the clerks of the jury commission to exclude from further consideration for jury service those persons who affirmatively state on their questionnaire that they do exercise the privilege of the franchise in some other jurisdiction; that such exclusion has been made as a matter of routine practice without further consideration of whether the person so answering was otherwise qualified for jury service as a "resident of the District of Columbia" within the meaning of Section 11-1417 of the District of Columbia Code, as interpreted by the Courts of this District; that this illegal and improper systematic exclusion of persons qualified for jury service in the District of Columbia occurred in the selection of the Grand Jury which returned the indictment herein. The defendant states that he is prepared to prove the foregoing facts by oral testimony at the time of the hearing on this motion.

* * * *

1128 Filed Jan 26 1953 Harry M. Hull, Clerk

On this 23rd day of January, 1953, came the attorney for the United States; and the defendant by his attorney, W. A. Kehoe, Esquire; whereupon each of the defendant's motions for leave to file second motion to dismiss; to reconsider motions to dismiss and for bill of particulars; for an election and for discovery and inspection is denied; and defendant's motion filed April 3, 1952 for bill of particulars is granted in part.

By direction of H. A. Schweinhaut Presiding Judge

* * * *

1129 Filed Feb 19 1953 Harry M. Hull, Clerk

Bill of Particulars

The following information is submitted in response to those portions of the defendant's Motion for Bill of Particulars which have been granted by the Court:

1. The defendant's perjurious testimony before the Subcommittee of the Committee on Banking and Currency, United States Senate, as alleged in Counts One, Two and Three of the indictment herein, was given under oath administered by J. William Fulbright, a member of the United States Senate and Chairman of the said Subcommittee. Such oath was authorized to be administered by 2 U.S.C. 191.

2. The defendant's perjurious testimony before the Grand Jury of the District of Columbia, as alleged in Count Four of the indictment, was given under oath administered by Walter Andrew Gentner, foreman of the said Grand Jury. Such oath was authorized to be administered by Rule 6(c) of the Federal Rules of Criminal Procedure.

3. With respect to Count One, paragraph 3, of the indictment, defendant did participate in his official capacity in the processing and consideration of loan applications made by the Lustron Corporation, Columbus, Ohio, with the Reconstruction Finance Corporation, dated January 17, 1947 and June 1, 1948, photostats of which are annexed.*

4. With respect to Count Two, paragraph 3, the fee of \$312.50 mentioned therein was received by defendant on or about May 18, 1950.

5. With respect to Count Four, paragraph 4, Charles A. Koons & Co. had the following matters pending:

a. A matter pending in the State Department involving the release of funds in the estate of the mother of Tom Weber.

1130 b. A matter pending in the office of the Alien Property Custodian, involving the purchase of E. Leitz, Inc., 304 Hudson, New York.

c. A matter involving the employment of Jack Gidera by the Economic Cooperation Administration.

d. A matter of a loan by the Reconstruction Finance Corporation in which the King Mountain Mica Company was interested.

* * * *

1248 Filed Mar 10 1953 Harry M. Hull, Clerk

Supplemental Bill of Particulars

The following supplemental information is submitted in response to defendant's Motion for a Bill of Particulars:

As to Count Four, paragraph 4, of the indictment herein: Pursuant to arrangements made by defendant for conferences by representatives of Charles A. Koons &

* See Government Exhibits 16 and 24.

Company with Government employees and officials, Charles A. Koons discussed with officials of the Reconstruction Finance Corporation, (1) the matter of a loan by that Corporation to Northwestern Steel & Wire Company and (2) the matter of a loan by that Corporation to the Follansbee Steel Corporation.

* * * *

1249 Filed Mar 31 1953 Harry M. Hull, Clerk

On this 31st day of March, 1953, came again the parties aforesaid, in manner as aforesaid, and the same jury as aforesaid in this cause, the hearing of which was respite yesterday; whereupon the said jury upon their oath say that the defendant is guilty as charged in the indictment; whereupon each and every member of the jury is asked if that is his or her verdict and each and every member thereof say that the defendant is guilty as charged in the indictment.

The case is referred to the Probation Officer of the Court. The defendant is permitted to remain on bond pending sentence.

By direction of Matthew F. McGuire Presiding Judge.

* * * *

1250 Filed Apr 29 1953 Harry M. Hull, Clerk

Memorandum Opinion

Motion for new trial denied on all grounds. With particular reference to ground No. 1, namely, that the indictment was fatally defective because it failed to set forth the person before whom the oath was taken together with his authority to administer the same, I hold this is of no moment despite the opinion of the United States Court of Appeals for the Fifth Circuit in the matter of U. S. et al. v. Henry Debrow, et al. dated April 10, 1953, which I conclude is neither controlling nor persuasive.

The only purpose of an indictment is to set forth with clearness and all necessary certainty the offense charged so that the defendant may be made aware of the crime of which he stands accused. There is nothing esoteric about it. Its purpose is to furnish him with such a description of the charge against him as will enable him to make his defense and avail himself of his conviction or acquittal for protection against a further prosecution for the same cause and secondly,—and often forgotten—to inform the Court of the facts alleged so that it may decide whether they are sufficient in law to support a conviction if one should be had. As a consequence, therefore, facts must be stated and not conclusions of law alone, because a crime is made up of acts and intent; and these must be set forth in the indictment, with reasonable particularity of time and place and circumstance. That is all that is required.

Here the crime alleged is perjury. Perjury is defined under our Statute (Title 14, Sec. 102, 1951 Ed., D.C. Code) as a “swearing, affirming or declaring or giving testimony in any form where an oath is authorized
1251 by law . . . and where the person charged is lawfully sworn—and in any case where he would be guilty of said crime if sworn according to the forms of the common law.”

The particular statute under which the indictment was drawn reads as follows (Title 22, Sec. 2501, D. C. Code, 1951 Ed.):

“Every person who, having taken an oath or affirmation before a competent tribunal, officer or person in any case in which the law authorized such oath or affirmation to be administered that he will testify, declare, depose or certify truly . . . and contrary to such oath or affirmation states . . . any material matter which he does not believe to be true, shall be guilty of perjury . . .”

Title 23, Sec. 204, D. C. Code (1940) with reference to the sufficiency of an indictment for perjury under the section referred to above, reads as follows:

"In every information or indictment to be prosecuted against any person for wilful and corrupt perjury, it shall be sufficient to set forth the substance of the offense charged upon the defendant and by what Court *or* [underlineation supplied] before whom the oath was taken (averring such Court or person or persons to have a competent authority to administer the same) . . ."

I conclude that under this section the charge that the Senate Subcommittee was a competent tribunal (a fact admitted by the defense and, therefore, not in issue) complies with the statute and particularly with that section requiring averment to the effect that the tribunal was competent to administer the oath. And I further conclude that by its very nature as an admitted "competent tribunal" since an oath was taken it matters not who administered it. The essential element is that of the competency of the tribunal and what is argued here as a fatal defect is merely one of form and not of substance. See generally: *U. S. v. Mills*, 32 U.S. 131, 139, 141, 142; (although the matter there involved was a misdemeanor, the principle is the same.)

The gist of the offense is the false oath before a competent tribunal and its essential elements have been communicated to the accused.

1252 There is basically no difference between the so-called general federal statute and the local District one, under which the indictment here was secured.

Both these statutes (Title 18, U.S.C. 1621 and the local one) in all essential respects appear to be a reenactment of the British statute, 23 Geo. II, Chap. 11. Under that statute "it shall be sufficient to set forth the substance of the offense charged, and by what court, etc. *or* [under-

lineation supplied] before whom the oath was taken (averring such court etc. to have competent authority to administer the same . . .” *The King v. Dowlin*, 5 T.R. 311, 319.

The sufficiency in an indictment for perjury of merely setting forth “the substance of the offence is not new in the statutes of the United States. It was so provided in the Crimes Act of April 30, 1790, 1 Stat. 112, 116, Chap. 9, § 18 and the latter act in the particular mentioned was the same as that of 23 Geo. II, Chap. 11 . . .” referred to above. *Markham v. United States*, 160 U.S. 319, 324 (1895). (In that case, however, it was necessary to name the individual before whom the oath was taken and to set forth his grant of authority, because he was a special examiner of the Pension Bureau.) Here the tribunal being competent, and admitted to be such, had inherent authority by virtue of what it was, to impose the sanction of the oath, and it was no more necessary to set forth the name of the functionary before whom the oath was taken any more than it would be necessary to aver the name of the Clerk if the matter alleged to be perjurious took place before a court of competent jurisdiction. The averment of the competency of the tribunal and that of the fact that an oath was administered, under authority of law, is sufficient, and descent to the particular not required.

Hilliard v. United States, 24 F. 2d 99 (1928), which the Court of Appeals for the Fifth Circuit relies on so heavily in support of its opinion, does not in any way, as I read it, gainsay what has been said above. It merely reiterates what was said generally in the 1253 *Markham* case, *supra*, and I find nothing there either contrary to or in any way militative against what has been held here.

Apart from all this, the Court further concludes that if such averment is necessary then it appears such re-

quirement is in conflict with the Federal Rules of Criminal Procedure,¹ and must be regarded as having been superseded by such rules—and this applies to the local statute as well.

For Rule 7(c), 18 U.S.C.A., following section 687 relating to indictments, generally provides that “the indictment or the information shall be plain, concise and definite statement of the essential facts constituting the offense charged . . . It need not contain . . . any other matter not necessary to such statement . . .”

They were designed to eliminate technicalities long outmoded. The relict of an era when men were hanged for crimes capital other than murder and treason—and mostly against property, and carried over with the great body of English common and statutory law into the law of the colonies.²

I think Judge Rives, in his dissent in the Debrow case, *supra*, has stated the law as it is today at least in the Federal courts, and he has both reason and basic common sense on his side, and with whose opinion this Court not only agrees but concurs. Motion denied on all grounds.

/s/ Matthew F. McGuire
Matthew F. McGuire
United States District Judge

April 29, 1953

¹ The Act of June 29, 1940, 18 U.S.C.A. §687, provides that on promulgation of the Rules all laws in conflict therewith shall be of no further force or effect.

² “I do not think that anything has tended more strong to bring the law into discredit than the importance attached to such technicalities . . . As far as they went their tendency was to make the administration of justice a solemn farce. Such scandals do not seem, however, to have been unpopular. Indeed, I have some doubt whether they were not popular, as they did mitigate, though in an irrational, capricious manner, the excessive severity of the old criminal law.” *History of the Criminal Law of England*, Stephen, Vol. 1, McMillan and Co., 1883, C. IX, p. 284.

* * * *

1254 Filed Apr 30 1953 Harry M. Hull, Clerk

On this 30th day of April, 1953 came the attorney for the government and the defendant appeared in person and by counsel, James F. Reilly, Esquire.

It is Adjudged that the defendant has been convicted upon his plea of not guilty and a verdict of guilty of the offense of violation of Title 22, Section 2501 District of Columbia Code as charged and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

It Is Adjudged that the defendant is guilty as charged and convicted.

It Is Adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of

Four (4) Months to Two (2) Years on Count One;
Four (4) Months to Two (2) Years on Count Two;
Four (4) Months to Two (2) Years on Count Three;
Four (4) Months to Two (2) Years on Count Four;
the sentences imposed on Counts Two, Three, and Four to run concurrently with the sentence imposed on Count One.

It is Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

/s/ Matthew F. McGuire
United States District Judge.

* * * *

1255 Filed Apr 30 1953 Harry M. Hull, Clerk

Notice of Appeal

Name and address of appellant is E. Merl Young, Homestead, Florida.

Name and address of appellant's attorney—James F. Reilly, 821 15th Street, N. W., Washington, D. C.

Offense—Perjury.

On March 31, 1953 the defendant was convicted on four (4) counts of perjury. The first three (3) counts were based upon testimony given to the Sub-Committee of the Committee on Banking and Currency of the United States Senate. The fourth (4th) count was based upon testimony given before the Grand Jury of the District Court.

On April 30, 1953 he was sentenced to serve a term of not less than four months nor more than two years on each of the counts, to run concurrently. He is presently confined to the Washington Asylum & jail pursuant to the judgment entered by the Court on April 30, 1953.

I, the above-named appellant, hereby appeal to the United States Court of Appeals for the District of Columbia Circuit from the above-stated judgment.

/s/ E. Merl Young
E. Merl Young, Appellant

April 30, 1953

• • • •

1262

United States of America

v.

E. Merl Young

No. 355-52

To Edward Goring Bliss, 725 - 13th Street, N. W. or
3808 Reno Road, N. W., Washington, D. C.

You are hereby commanded to appear in the United States District Court for the District of Columbia at 3rd & Constitution Ave., N. W., 2nd Floor, Courtroom 7, in the city of Washington on the 16th day of January 1953 at 10:00 o'clock A.M. to testify in the case of United States v. E. Merl Young and bring with you the annual reports of the Jury Commission for the District of Columbia from the year 1945 to the present date, inclusive.

This subpoena is issued upon application of the defendant.

HARRY M. HULL

January 14, 1953.

* * * *

1263

United States of America

v.

E. Merl Young

No. 355-52

To Frank T. English, Room 4118, United States Court-
house, Washington, D. C.

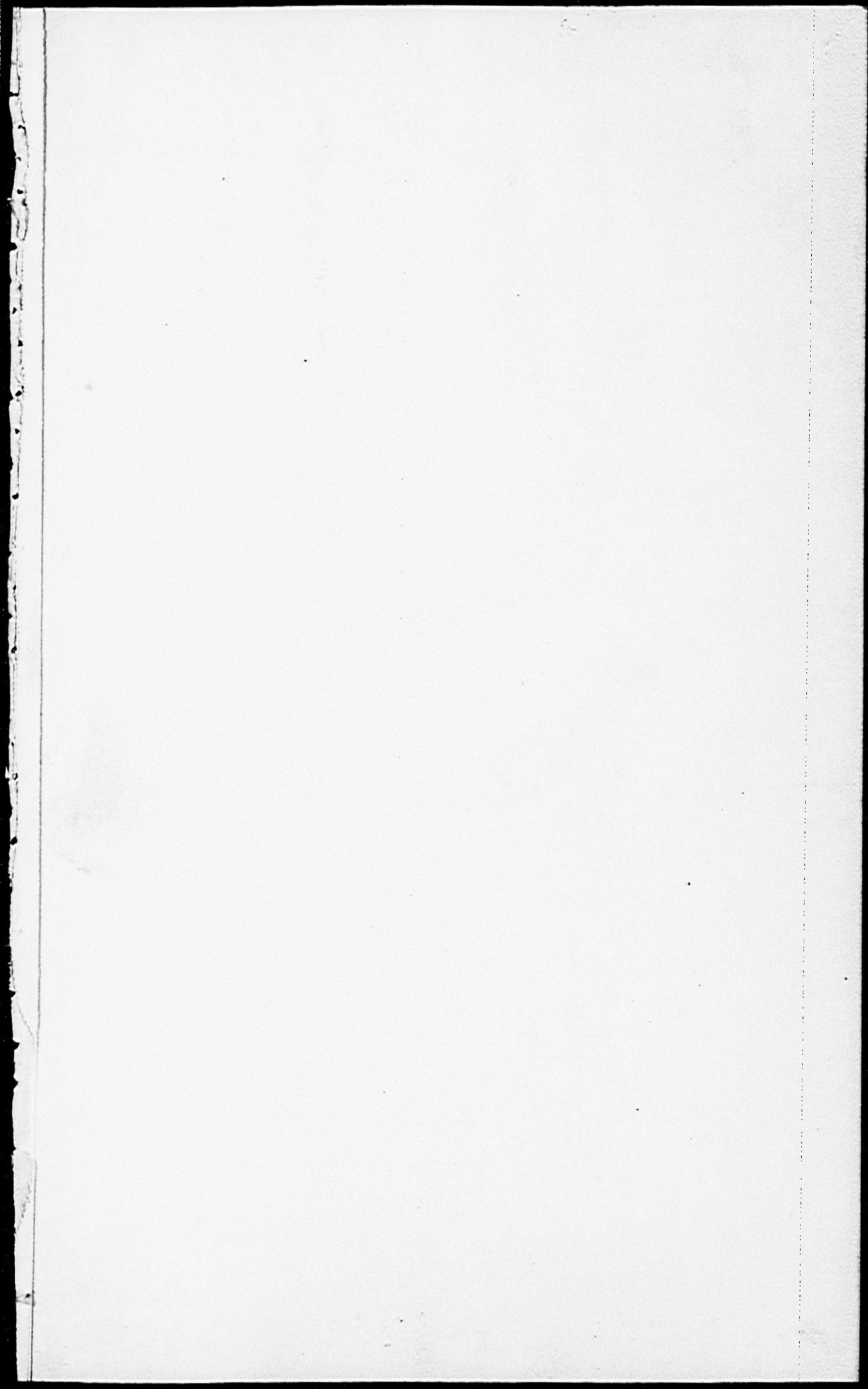
You are hereby commanded to appear in the United States District Court for the District of Columbia at 3rd & Constitution Ave., N. W., 2nd Floor, Courtroom 7,

in the city of Washington on the 16th day of January 1953 at 10:00 o'clock A.M. to testify in the case of United States v. E. Merl Young and bring with you copies of the questionnaires which have been mailed to prospective jurors in the District of Columbia from 1945 to the present time, inclusive.

This subpoena is issued upon application of the defendant.

HARRY M. HULL

January 14, 1953



BRIEF FOR APPELLEE

IN THE
United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 11,782

E. MERL YOUNG, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

*United States Court of Appeals
For the
District of Columbia Circuit*

FILED NOV 9 1953

Joseph W. Stewart
CLERK

**APPEAL FROM THE JUDGMENT OF THE UNITED STATES
DISTRICT COURT FOR THE DISTRICT OF COLUMBIA**

LEO A. ROVER,

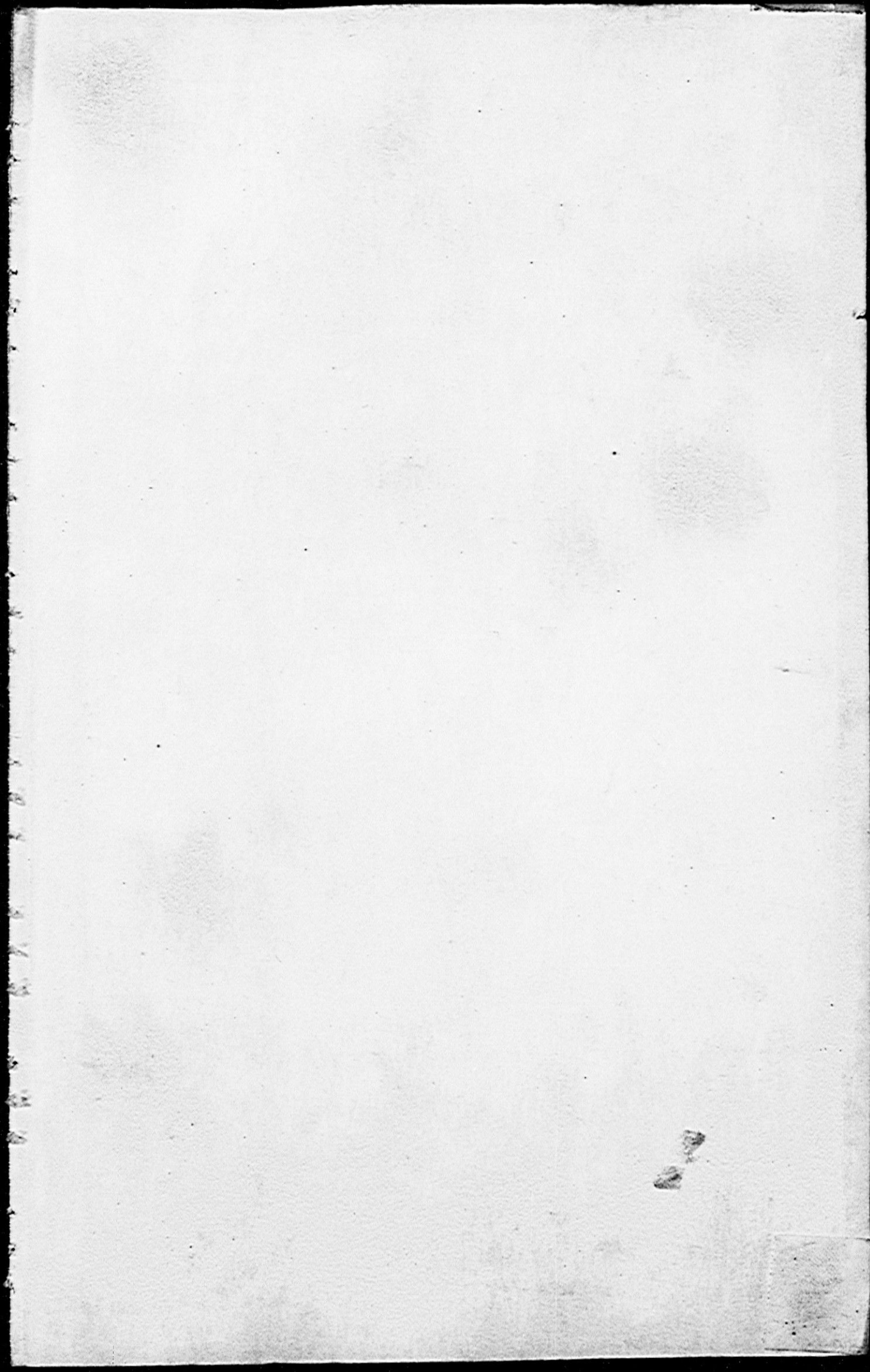
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QUESTIONS PRESENTED

In the opinion of the appellee, the questions are:

1. (a) As to the fourth count, whether Rule 7(c), F. R. Crim. P., does not supersede or repeal 23 D. C. Code § 204, concerning the essential allegations of a perjury charge, thus making valid a perjury charge which in compliance with Rule 7(c) sufficiently alleges all of the elements of the crime as defined in the perjury statute, even though it fails to comply with the requirements of 23 D. C. Code § 204. And, if Sec. 204 is not thus superseded or repealed, whether a perjury charge, following the language of the perjury statutes in the Federal and D. C. Code, (alleging that the defendant, "having duly taken an oath before a competent tribunal, to-wit the Grand Jurors * * * " [sitting as an appendage of the *District Court*], in a case "in which a law of the United States authorizes an oath to be administered") is defective under Sec. 204 for not alleging "by what *court*, or before whom the oath was taken (averring such *court*, or person or persons, to have a competent authority to administer the same)." (Italics supplied.)

(b) If the conviction is not sustained on Count IV, then as to Counts I, II and III, whether or not a perjury charge, following the language of the general perjury statute and the District of Columbia perjury statute, (alleging that the defendant, having duly taken an oath before a competent tribunal, to-wit, a United States Senate Subcommittee, in a case in which the law authorizes an oath to be administered, that he would testify truly, did knowingly and wilfully, and contrary to said oath, state material matter which he did not believe to be true) is defective for not alleging the name of the person who administered the oath and that such person had competent authority to administer same.

2. Whether the District Court erred in denying appellant leave to file a second supplemental motion to dismiss the indictment, alleging that the grand jury returning it was disqualified because the Jury Commission had improperly,

systematically and intentionally excluded from the jury list an eligible *class* of jurors, i. e., those residents of the District of Columbia who voted in one of the States, where the proposed motion (a) was waived because presented nine months after indictment was returned and plea entered, and after an original and a supplemental motion to dismiss had been denied, thus failing to comply with Rule 12(b)(2) F. R. Crim. P. and District Court Rule 92; (b) was offered for filing solely in the District Court's discretion, under Rule 12(b)(2) and Rule 12(b)(3), F. R. Crim. P.; (c) was based on hearsay assertions unsupported by any affidavit of facts; (d) was presented subject to the District Court's judicial knowledge that the Jury Commission had not illegally excluded an eligible *class* of jurors from the jury list, although it had excluded some eligible residents because they voted in one of the States; (e) was defective for not alleging any prejudice to the appellant because of the exclusion.

3. (a) Whether a subcommittee of the United States Senate, sitting as a competent tribunal within the meaning of the perjury statute, becomes incompetent under that statute if it continues to sit after the Senate is in session, without first obtaining the Senate's permission as provided by the Legislative Reorganization Act of 1946, where such Act although in statutory form is merely a rule of convenience adopted by the Senate for its own internal administration and does not affect the competence of its committees, and where the rule applies only to standing committees and not to subcommittees.

(b) Whether a subcommittee of the United States Senate is engaged in a legislative function if it holds hearings to obtain additional evidence on an authorized subject on which it has reported tentative findings of fact, and in which tentative report a minority of the subcommittee reserves comment pending further hearings, and which tentative report is thereafter followed by another interim report and a final report, on the subject under investigation, favorably reporting pertinent legislative measures.

4. Whether substantial evidence under the "two witness"

rule was adduced on any of the four counts of perjury upon which appellant was convicted and sentenced to concurrent terms of imprisonment within the maximum period of sentence on any count.

5. Whether prejudicial error was committed by the prosecution in the course of the trial.

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IN THE
United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 11,782

E. MERL YOUNG, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

*APPEAL FROM THE JUDGMENT OF THE UNITED STATES
DISTRICT COURT FOR THE DISTRICT OF COLUMBIA*

BRIEF FOR APPELLEE

COUNTER-STATEMENT OF THE CASE

On February 28, 1952, appellant was charged by indictment, in four counts, with having committed perjury in violation of 22 D.C. Code § 2501. The first three counts, in substance, charge respectively that before a Subcommittee of the Committee on Banking and Currency, United States Senate, sitting in the District of Columbia, appellant perjurally testified (1) that while employed at the Reconstruction Finance Corporation he never had anything to do with the loan applications made by the Lustron Corporation, (2) that since leaving Government employ he had not received fees or commissions from anyone, and all of his income had been in the form of salaries from employers or advances from companies in which he owned an interest, and (3) that he did not know of any money he had borrowed, other than loans of \$32,000 from the Atlantic Basin Co., \$7,500 from Mr. Rosenbaum, \$8,500 from L. N. Rosenbaum, and \$120,000 (on his account, \$30,000) from F. L. Jacobs Co. The fourth count charges that appellant perjurally testified before the grand jury, in the District of Columbia, in substance, that since 1948 he had not been paid by any-

one or by any company for any efforts expended in their behalf in putting them in touch with Government employees or officials about matters pending in Federal agencies, and that during this period he did not receive any commissions or other remuneration from any company except his salary from the Lustron Corporation and the F. L. Jacobs Co. (J. App. 10A).

After a jury trial lasting eight days, appellant was found guilty on all counts (J. App. 6A). Judgment of conviction was entered and appellant was sentenced to imprisonment for a period of four months to two years on each count, the sentences to run concurrently (J. App. 33A). From this judgment the instant appeal is being prosecuted. The pertinent details of the arraignment, plea, motions, verdict, judgment and sentence are set out in the Joint Appendix.

The evidence adduced at the trial shows the following:

Appellant was born in Jackson County, Missouri, on August 26, 1913. He moved to Washington, D. C. around 1940 and was employed first as a messenger and later as a junior auditor in the General Accounting Office. He studied accounting, but did not complete the courses required for graduation (Tr. 755). After serving in the armed forces from 1942 to 1945, appellant was employed by the Reconstruction Finance Corporation in Washington, D. C. (hereinafter called R. F. C.), where his duties were to "keep track of the property." Subsequently, he was transferred to the examining division of the R. F. C. (Tr. 756), and assigned to work under Hubert Steele, an experienced examiner, for training in the performance of the examiner's duties in connection with loan applications and disbursements (Tr. 345).

During the period of appellant's employment as an examiner, the processing of an application for R. F. C. loan normally involved the following principal steps: Written application for loan was made to a field agency of the R. F. C. in triplicate, and was assigned to an agency examiner and an advisory committee, for review and recommendations. Reports and recommendations were submitted by the examiner and the advisory committee to the agency manager, who forwarded the application and re-

ports, together with his own recommendation, to the R. F. C. in Washington, D. C. (Tr. 226-27).

Upon receipt at the R. F. C. in Washington, one set of the application, agency reports and recommendations was sent to the docket section, another set was sent to the legal section, and the third set was assigned to an examiner for review and recommendation. The examiner studied the entire file, consisting of the application plus the agency reviews and recommendations, then attached his report and recommendation, with all the reasons therefor, and forwarded the complete file to a review committee. The members of the review committee, consisting of three to five R. F. C. officials, studied everything that had gone on before, added their recommendation, and submitted the entire file to the Board of Directors, which finally approved or disapproved the application. Each step in this procedure was part of the application process, and each report and recommendation was attached to and made a part of the application file (Tr. 224, 228-30, 630, 649). It was the responsibility of the Manager of the Loan Office to see that all appropriate steps in the process were performed (Tr. 218).

If a loan application was finally approved, the money was not paid out in a lump sum to the borrower, but was disbursed as required. An examiner was assigned to study and submit recommendations on requested disbursements under an approved loan (Tr. 212-13), which requests were transmitted to the Board of Directors for final approval or disapproval (Tr. 756). This function of the examiner was called "servicing" the loan (Tr. 213), and in principle was similar to the duties involved in examining an original application (Tr. 373). There was no distinction between an examiner who worked on original applications and one who serviced an approved loan, as all examiners performed both functions even though one might service a loan on which another had made the original study and recommendation (Tr. 373). The appellant performed both functions (Tr. 758). Also, if an examiner were servicing a loan, and the borrower made application for an additional loan, it was the duty of such examiner to study the additional application and make a recommendation to the review committee

for approval or disapproval, even though another examiner may have handled the original application. In all cases, the examiner was free to recommend for or against approval of the loan (Tr. 343).

At the time appellant was transferred to the examining division and assigned to work under Hubert Steele, Steele was engaged in preparing a report and recommendation on an original application for R. F. C. loan of \$15,500,000 made by the Lustron Corporation of Cleveland, Ohio, on January 17, 1947 (Tr. 345, 681; G. Ex. 16). The Lustron Corporation was engaged in the manufacture of pre-fabricated houses (Tr. 624).

Sometime prior to October, 1947, after the original Lustron application was approved, the appellant was assigned to service the loan (Tr. 206-07, 654, 680-81). His office was moved to the floor just above the offices of the Board of Directors (Tr. 834-35), and appellant was thereafter frequently in discussions with the Directors about the manner in which the Lustron Corporation was being run (Tr. 654).

On June 1, 1948 the Lustron Corporation filed directly in the Washington offices of the R. F. C. an application for an additional loan of \$10,000,000 (G. Ex. 16), which, under normal procedure would have gone to the appellant for study and recommendation (Tr. 343). Director Gunderson, at the request of Director Hise, suggested to Carl A. Strandlund, president of the Lustron Corporation, that Lustron employ appellant to work on the acquisition of machinery and supplies for its manufacturing plant (Tr. 655-56). A week or two after Lustron's application for additional loan was filed, Strandlund offered appellant the job of "Washington representative" for Lustron with the title of assistant secretary at a salary of \$10,000 per year. Appellant asked for \$12,000, which was agreed upon, and the employment was approved by the R. F. C. Board of Directors (Tr. 768-69).

The Lustron application for additional loan was recommended for approval by the review committee and transmitted to the Directors. While it was under discussion by Directors Gunderson, Hise, Willett, and perhaps others, it

was noticed that the review committee's recommendation did not bear the concurrence of the appellant Young as examiner or of Morton Macartney, manager of the Loan Office, and it was returned for the purpose of getting their signatures (Tr. 685-86).

Appellant received the review committee's recommendation for approval of Lustron's application for the additional \$10,000,000 loan, read it, approved the recommendation, and in the performance of his official duties as an R. F. C. examiner, signed his name to the document concurring in the review committee's recommendation (Tr. 856-57). Macartney also signed the document in the performance of his official duties (Tr. 218). On July 15, 1948, the Board of Directors approved the additional loan to Lustron, and on the same day appellant resigned from the R. F. C. to become Lustron's Washington representative (Tr. 840-41).

Appellant then opened an office in Washington, D. C., and in addition to his employment with Lustron, was hired as the Washington representative of the F. L. Jacobs Co. at \$10,000 per year (G. Ex. 14, p. 612; Tr. 783). Six or seven months later, after the 1948 presidential election, appellant's salary was raised by Lustron from \$12,000 to \$18,000 per year (Tr. 838).

While carrying on his business as a "Washington representative," appellant was active in the 1948 presidential campaign, and worked with the Democratic National Committee in September and from the first of October through the November election (Tr. 872-73).

Around October, 1949, appellant resigned his position at Lustron (Tr. 769-70). Prior to his resignation, he discussed employment with Wesley J. Peoples, president of the United States Radiator Corporation at Detroit, Michigan. Peoples considered hiring appellant Young as an officer of U. S. Radiator because he believed Young might be able to obtain the Lustron radiator business for his company. While the matter of Young's employment was under consideration by the radiator company officials, Young telephoned Peoples on three occasions in October, November and December, 1949, and each time borrowed \$1,000 which Peoples supplied by three checks (Tr. 402-06; G. Ex. 31).

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The appellant never repaid the loan (Tr. 417). Young admits that he received the three \$1,000 checks as loans from Peoples and that he entered them as loans on his books (Tr. 850-51).

Also, around October, 1949, appellant telephoned Charles A. Koons in New York and asked Koons to order him 1,000 shares of F. L. Jacobs stock. Koons placed the order with Winslow, Douglas and McEvoy, New York stockbrokers, and the stock was purchased on October 13, 1949 for the account of E. Merl Young (Tr. 432, 547-48), and sent to Young, receipt of which appellant acknowledged (G. Ex. 39). The broker looked to appellant for payment (Tr. 548), but when notified by Koons that payment was due, appellant said, "Well, I am a little short right now. Would you go ahead and pick it up for me?" Koons agreed, and issued his check to the broker on November 10, 1949, in the amount of \$5,983.80 in payment of Young's stock purchase (Tr. 432-33; G. Ex. 33). Koons treated this advance to Young as a loan and transmitted note to Young for execution covering the obligation (Tr. 433-34, 509, 513; G. Exs. 38a-b, 40). However, Young did not sign the notes or repay Koons (Tr. 434, 510).

Also, in October, 1949, Hubert Steele, who first instructed Young in the duties of an R. F. C. examiner, resigned from the R. F. C. and went into business in Washington, D. C. as a manufacturer's agent under the partnership name of Ribenack & Steele (Tr. 341, 346). Among Steele's clients was W. J. Binkley, president of the Binkley Manufacturing Co., Warrenton, Missouri, who had previously obtained a loan from the R. F. C. on which Steele had been the examiner (Tr. 347-50). Steele sought Young's assistance in obtaining Government contracts for Binkley, and in taking care of any problems that might come up in R. F. C. in connection with Binkley's loans (Tr. 353-54). Steele offered to pay Young for this assistance half of his fee from Binkley, which was \$7,500 per year, and they reached a "gentlemen's agreement" to this effect (Tr. 354). When the first monthly check for Steele's fee was received from Binkley in the amount of \$625.00, Steele drew his partnership check for half the amount (\$312.50) and gave it to Young (Tr. 354,

G. Ex. 27, 28). Although Young told Steele he did not want the money and had done nothing to earn it, Steele threw the check on appellant's desk and said "Here is what I owe you" (Tr. 354-55). Young admits he retained the check, and after debating about whether to take the money or not, finally decided to take it and cashed the check (Tr. 766).

Subsequently, after the November election, Koons, who was in the business of buying and selling steel and machinery under the name of Charles A. Koons & Co., New York City, employed Young as his Washington representative or "leg man" at a salary of \$18,000 per year (Tr. 434-437). Koons referred to Young three matters pending before Federal agencies which he asked appellant to work out with the agencies (Tr. 504-08; G. Ex. 35, 36, 37). At the end of February, 1950 after the Senate had authorized the investigation of the R. F. C., the employment relationship between Koons and appellant was terminated (Tr. 434).

On February 8, 1950, by S. Res. 219, the United States Senate directed the Committee on Banking & Currency to conduct a thorough study of the operations of the R. F. C., with special attention given to the recommendations concerning the R. F. C. of the Commission on Organization of the Executive Branch of the Government, headed by former President Herbert Hoover (G. Ex. 1).

The Hoover Commission had previously reported that direct Government lending "opens up dangerous possibilities of waste and favoritism" and "invites political and private pressure, or even corruption." The Hoover Commission recommended that Congress reconsider the power of Government agencies to make direct loans, "taking into account the problems of economy, efficiency, and integrity." (G. Ex. 2, pp. 23, 24, 44).

Pursuant to the direction of the Senate, the Committee on Banking & Currency, through its Subcommittee on R. F. C., made a study of the R. F. C., held extensive hearings and received evidence, and issued four interim reports and a final report on its findings and recommendations (G. Ex. 12, p. 1).

The first interim report, on the Texmass Petroleum Co. loan, was issued on May 19, 1950; the second, on the Lustron

Corp. transportation contract, was issued on August 11, 1950; the third, on Favoritism and Influence, was issued on February 5, 1951; the fourth, on loans to the Kaiser-Frazer Corp. was issued on July 19, 1951, and a final report was issued on August 20, 1951 (G. Ex. 12, p. 1).

In the interim report on Favoritism and Influence, the Subcommittee had the following to say about the appellant (G. Ex. 11, p. 6):

“The individual named most frequently in the reports of alleged influence which have reached the subcommittee is E. Merl Young. Director Gunderson described him to the subcommittee as an expeditor.

Merl Young worked for a dairy company in Washington during 1937 and half of 1938. He was self-employed in Jerico Springs, Mo. after that and until the end of 1939. In 1940, his wife having accepted employment with Senator Truman, Young returned to Washington and became an assistant messenger in the Government's General Accounting Office. The salary was \$1,080 a year. He served in the Marine Corps from 1942 to 1945, and then he became an RFC examiner at \$4,500 a year. By July of 1948 his salary at RFC had risen to \$7,193 a year.

More recently, Merl Young has been an \$18,000-a-year vice president of the Lustron Corp. and, simultaneously, a \$10,000-a-year official of F. L. Jacobs Co. Both were RFC borrowers at the time Strandlund, the president of Lustron, testified that he was unaware of Young's employment with the F. L. Jacobs Co. It seems that Young acquired and held both of these positions because of the influential atmosphere which surrounds him.

At the present time, Merl Young and his friends say that he is an entrepreneur in the insurance business. According to his tax reports, which the subcommittee examined in August, he expected his 1950 income to approximate \$60,000. During the first 8 months of its existence, however, the insurance business had been financed exclusively by the law firm of Goodwin, Rosenbaum, Meacham & Bailen and the officials of F. L. Jacobs Co., and it had not earned a sufficient gross revenue to pay expenses.

Other close relationships between Young and the Rosenbaum firm have been uncovered in connection with matters which concerned the RFC. It was also

found that Young has been closely associated with Willett and Dunham, with whom it has been alleged that Rosenbaum claims to have special influence.

According to sworn testimony Young has offered to be influential for a fee on behalf of persons seeking to do business with the RFC."

Following its publication, this interim report received such criticism as decided the subcommittee to hold further open hearings in order to "develop publicly and more specifically the evidence in support of that report" (G. Ex. 14, pp. 595-96).

Appellant acquired a copy of the interim report on Favoritism and Influence and about a week later the subcommittee issued a subpoena to him directing him to testify before it. Appellant retained two lawyers to assist him in drafting a statement in reply to the interim report (Tr. 839, 852). The appellant testified before the subcommittee for the first time on February 21, 1951, and was permitted to read his prepared statement (G. Ex. 14, p. 609). He introduced his prepared testimony with the statement, "I am pleased to have this opportunity to appear and correct certain inaccuracies of the report of the subcommittee, to make available any other facts concerning my business activities or my private life, relevant to the subject of the inquiry." (G. Ex. 14, p. 610). Young then proceeded to testify from his prepared statement to two matters for which he was subsequently indicted and convicted of perjury: "While I was employed by the R. F. C. I never had anything to do with the loan applications made by Lustron." (G. Ex. 14, p. 611), and "All my income since leaving Government employ has been in the form of salaries from employers or advances from companies in which I own an interest. I have never received one cent in the form of commissions or fees from anyone" (G. Ex. 14, p. 612).

Later, while under interrogation before the subcommittee, appellant testified in substance that except for specified loans he had received from the Atlantic Basin Co., from Mr. Rosenbaum, from L. N. Rosenbaum, and from the F. L. Jacobs Co., he did not know of any other money he had bor-

rowed (G. Ex. 14, pp. 918-19). Appellant was convicted of perjury on this testimony.

On March 9, 1951, Mr. James P. O'Brien, chief of the Fraud Unit in the Criminal Division, Department of Justice (Tr. 169), was directed by the Attorney General to conduct a grand jury investigation to determine if there had been committed in the District of Columbia violations of Title 18, U. S. Code, Sections 1621, 1001, 371, involving perjury, false statements, fraud against the Government, and conspiracy (G. Ex. 15). Information had been brought to the attention of the Department of Justice that money and fees had been paid to appellant by persons who had close associations with the R. F. C. and the grand jury investigation was directed at the possible criminal aspects of such payments, including an inquiry into the nature and extent of appellant's associations with the Directors and officials of the R. F. C. in the light of the testimony before the subcommittee, and the nature and extent and source of appellant's fees, commissions, loans, expenditures, salaries, and income, whether or not any false statements were filed with the R. F. C. in connection with loan applications, and whether or not appellant had testified perjurally before the Senate subcommittee (Tr. 170).

Appellant appeared before the grand jury on December 17, 1951, and testified in substance that he had not received any pay for efforts expended in putting persons in touch with Government employees or officials about matters pending in Federal agencies; that the only pay he had received since 1948 was in the form of a salary from the Lustron Corp. and F. L. Jacobs Co., that during this period he had never received any commission or other remuneration from any other company (G. Ex. 6). Appellant was convicted of perjury on this testimony.

From the foregoing judgment of convictions, this appeal is prosecuted.

STATUTES AND RULES INVOLVED

The relevant parts of the following statutes and rules provide:

Rule 1, F. R. Crim. P.:

Scope. These rules govern the procedure in the courts of the United States and before United States commissioners in all criminal proceedings, * * *.

Rule 2, F. R. Crim. P.:

Purpose and Construction. These rules are intended to provide for the just determination of every criminal proceeding. They shall be construed to secure simplicity in procedure, fairness in administration, and the elimination of unjustifiable expense and delay.

Rule 7(c), F. R. Crim. P.:

(c) *Nature and Contents.* The indictment or the information shall be a plain, concise and definite written statement of the essential facts constituting the offense charged.

Rule 12(b)(2), F. R. Crim. P.:

(2) *Defenses and Objections Which Must Be Raised.* Defenses and objections based on defects in the institution of the prosecution or in the indictment or information other than that it fails to show jurisdiction in the court or to charge an offense may be raised only by motion before trial. The motion shall include all such defenses and objections then available to the defendant. Failure to present any such defense or objection as herein provided constitutes a waiver thereof, but the court for cause shown may grant relief from the waiver. Lack of jurisdiction or the failure of the indictment or information to charge an offense shall be noticed by the court at any time during the pendency of the proceeding.

Rule 12(b)(3), F. R. Crim. P.:

(3) *Time of Making Motion.* The motion shall be made before the plea is entered, but the court may permit it to be made within a reasonable time thereafter.

Rule 92, District Court for the District of Columbia:

Motions under Rule 12 and 41(e) of the Federal Rules of Criminal Procedure shall be made either before a plea is entered or within ten days after arraignment, unless the Court extends the time either at arraignment or on written application made within the said ten day period. Such application shall set forth the grounds upon which it is made and shall be served

on the United States Attorney. The Court, in its discretion may, however, for good cause shown, permit a motion to be made and heard at a later date.

Section 5391, Revised Statutes, 2d ed. (18 U.S.C. [1940 ed.] 558), repealed by the Act of June 25, 1948, revising the Criminal Code (62 Stat. 683, 862):

In every presentment or indictment prosecuted against any person for perjury, it shall be sufficient to set forth the substance of the offense charged upon the defendant, and by what court, and before whom the oath was taken, averring such court or person to have competent authority to administer the same, * * * without setting forth the commission or authority of the court or person before whom the perjury was committed.

23 D. C. Code § 204, (1951 ed.):

In every information or indictment to be prosecuted against any person for wilful and corrupt perjury, it shall be sufficient to set forth the substance of the offense charged upon the defendant, and by what court, or before whom the oath was taken (averring such court, or person or persons, to have a competent authority to administer the same) * * * without setting forth the commission or authority of the court, or person or persons before whom the perjury was committed; any law, usage or custom to the contrary notwithstanding. (23 Geo. II, ch. 11, §1; Kilty's Rept. p. 252; Alex. Brit. Stat. 766.)

Compiler's Note

This section sets forth a British statute continued in force by virtue of the act of March 3, 1901, 31 Stat. 1189, ch. 854, § 1. It was obviously impossible to modernize the language of this statute.

United States Constitution, Art. 1, Sec. 5, Clause 2:

Each House may determine the Rules of its proceedings, punish its Members for disorderly Behavior, and, with the Concurrence of two thirds, expel a Member.

SUMMARY OF ARGUMENT

I

Appellant was convicted, on four counts, of testifying perjurally in violation of 22 D.C. Code, § 2501. It is not disputed that each count of the indictment fully alleges all of the essential facts required of a perjury indictment by Sec. 2501

and by Rule 7(c), F. R. Crim. P. Appellant contends, however, that the counts are defective because they do not allege the name and authority of the person administering the oath to the defendant, as contemplated by 23 D.C. Code, § 204, an old common law adopted during the reign of George II and brought into the D.C. Code by the Act of March 3, 1901, 31 Stat. 1189. Section 204 prescribes that it shall be sufficient for a perjury indictment "to set forth the substance of the offense charged upon the defendant, and by what court, or before whom the oath was taken (averring such court, or person or persons to have a competent authority to administer the same)." It is the Government's position that Sec. 204 was superseded by the enactment of Rule 7(c), F. R. Crim. P. governing the requirements of the indictment. Appellant argues that the inclusion of Sec. 204 in the 1951 edition of the District Code repeals Rule 7(c), but it is apparent from the historical note in the statute, and the compiler's note following it that the 1951 edition of the Code merely reprinted the Act of March 3, 1901 and was not a legislative re-enactment of the law. Appellant argues that these provisions of Sec. 204 are so fundamental to a perjury indictment that their omission is error regardless of whether or not Sec. 204 was repealed by Rule 7(c). The Government contends that the allegations of the indictment were sufficient to advise appellant of the nature of the charge, to enable appellant to prepare his defense, and to be pled in bar of a second prosecution for the same crime, and hence (especially since the information in question was supplied by a bill of particulars in advance of trial), the omission was not a fatal defect in view of the repeal of Sec. 204 by Rule 7(c). It is the Government's position, moreover, that the provisions of Sec. 204 were in fact complied with by the full description of the tribunal before which the perjury was committed, and the allegation that the appellant testified under oath in a matter in which the law authorized an oath to be administered. Especially does the fourth count comply with Sec. 204, which charges perjury before a described grand jury, an arm of the court. The allegation of the name of the individual who swore the witness is not required by Sec. 204 where the perjury is alleged to have

been committed before a court, as distinguished from some individual who has authority to compel testimony under oath.

II

Appellant contends that the court below erred in denying him leave to file a second supplemental motion to dismiss the indictment, in which he charged that the grand jury was disqualified because a class of eligible jurors had been improperly, intentionally and systematically excluded from the jury list on the sole ground that they had voted in one of the States. Permission to file the motion was not sought until ten months after the indictment was returned and nine months after the appellant had entered his plea (J. App. 23A, 24A). A comprehensive motion challenging the validity of the indictment and the institution of the prosecution, on numerous grounds, was filed seven months previously (J. App. 17A). The point was therefore waived under Rule 12(b)(2), F. R. Crim. P. and District Court Rule 92 because not included in the original motion. Under Rule 12(b)(3), F. R. Crim. P., release from the waiver was discretionary with the District Court, which held that no justification was shown for permitting the late filing of the motion. Additional indication of the intentional waiver is that the district court advised appellant that he might, if he desired, renew his motion at the trial, and this was not done. The District Court also properly observed that the proposed motion was lacking in substance. It merely set forth the unsworn assertions of what appellant had heard from some unnamed source and was not supported by any statement of persons in position to know the facts, nor was any evidence elicited or offer of proof made at the hearing on the motion. Leave to file such a dilatory motion, thus lacking in factual support, was properly denied. The only evidence before the District Court was the presumption of the regularity of the Jury Commission's operations and the Court's judicial knowledge that this branch of the Court had not improperly, systematically and intentionally excluded an eligible class of jurors from the jury lists. Moreover, the facts averred by appellant in his motion did not indicate such an exclusion. Merely because there are residents of the

District of Columbia who vote in the several States, they do not for that reason become a "class" essential to a representative cross section of the community, as described in *Thiel v. Southern Pacific*, 328 U.S. 217. Assuming that the District Court judicially knew that the Jury Commission had excluded some residents because they voted in one of the States, the proposed motion was defective because appellant did not allege or prove that the appellant was prejudiced by the exclusion.

III

A. Appellant contends that even though the Senate subcommittee was a competent tribunal when he began his testimony before it, it was incompetent when the perjurious statements were made because it was sitting without permission while the Senate was in session, contrary to the provisions of the Legislative Reorganization Act of 1946. It is the Government's position that by its express language this provision applies only to standing committees, not subcommittees, and that its non-observance did not affect the competence of this subcommittee. However, assuming that it did apply to this subcommittee, the provision, though in statutory form, was only a rule adopted by the Senate for its convenience. Its purpose was to help assure a quorum at its sessions, and, like other rules of convenience, such as those requiring subcommittees to make reports, keep records, etc., failure to comply with it did not affect the competence of the subcommittee to hold hearings and take testimony under oath. Sitting without consent by a subcommittee, unlike sitting without a quorum as considered in *Christoffel v. United States*, 338 U.S. 84, is at most a mere non-jurisdictional irregularity of which the Senate might take disciplinary action, but not an irregularity going to the legal competence of the subcommittee to discharge its legislative functions.

B. The legislative purpose of the subcommittee had not expired when appellant testified, as argued by appellant, because it was then investigating the R. F. C. pursuant to the direction of the Senate, reports on its inquiry were thereafter issued by it, and it thereafter recommended pertinent legislation.

IV

Appellant contends that the trial court erred in denying a motion for judgment of acquittal because, under the two-witness rule in perjury cases, there was a lack of substantial evidence upon all counts to sustain guilt. The rule is that the judgment must be affirmed if there is substantial evidence, taking the view most favorable to the Government, to support it. It is not for this Court to weigh the evidence or determine the credibility of witnesses. There is substantial evidence, in satisfaction of the two-witness rule, to support the verdict on all counts. However, since concurrent sentences were imposed upon all counts, within the maximum of each, the judgment must be affirmed if there is substantial evidence to support the verdict on any count.

V

Appellant alleges, but fails to demonstrate, misconduct by the prosecutors; certainly not sufficiently to warrant reversal. The proof of appellant's guilt was strong and convincing. In such case, instances of misconduct, if demonstrated, are less likely to warrant reversal. The instances of alleged misconduct relied upon by appellant for reversal are trifling, but are discussed in detail in appellee's argument.

ARGUMENT

I

The Indictment Fully Describes the Tribunal Before Which the Perjurious Testimony Was Given; It Charges that the Defendant Was Duly Sworn Before Such Tribunal, in a Matter in Which a Law of the United States Authorizes an Oath To Be Administered, and the Indictment Is, Therefore, Not Defective for Failing To State the Name and Authority of the Person Who Administered the Oath, Which Information Was Supplied by a Bill of Particulars.

Appellant was convicted on four counts of perjury under 22 D. C. Code § 2501. The first three counts involve testimony before a subcommittee of the United States Senate, and the fourth count involves testimony before a District of Columbia grand jury.

The elements of perjury are fixed by the perjury statute, Sec. 2501, which provides:

Every person who, having taken an oath or affirmation before a competent tribunal, officer, or person, in any case in which the law authorized such oath or affirmation to be administered, that he will testify * * * truly, * * * willfully and contrary to such oath or affirmation states or subscribes any material matter which he does not believe to be true, shall be guilty of perjury; * * *

The first three counts of the indictment describe the subcommittee and allege the administration of the oath in the following language: (J. App. 10A-15A.)

* * * the defendant herein, having duly taken an oath in a matter before a competent tribunal, in which a law of the United States authorizes an oath to be administered, to wit, the Subcommittee of the Committee on Banking and Currency, United States Senate, inquiring into and conducting a study of the operations of the Reconstruction Finance Corporation, * * * that he would testify truly, did unlawfully, knowingly and willfully, and contrary to said oath, state material matter which he did not believe to be true, that is to say: * * *

The fourth count describes the grand jury and the administration of the oath as follows: (J. App. 15A-16A.)

* * * the defendant herein, having duly taken an oath before a competent tribunal, to wit, the Grand Jurors of the United States of America, duly impanelled and sworn in the District Court of the United States for the District of Columbia, and inquiring for that District in a matter then and there pending before said Grand Jurors in which a law of the United States authorizes an oath to be administered, that he would testify truly, did unlawfully, knowingly and willfully, and contrary to said oath, state material matter which he did not believe to be true, that is to say: * * *

The indictment was drawn in compliance with the requirements of Rule 7(c), F. R. Crim. P., the pertinent part of which succinctly states, "The indictment or information shall be a plain, concise, and definite written statement of the essential facts constituting the offense charged." This

rule was enacted to secure simplicity and uniformity in federal procedure, and it alone governs the sufficiency of indictments under federal statutes. Prior and inconsistent statutes are superseded by this rule. (See Rules 1 and 2, F. R. Crim. P.) The indictment clearly and certainly sets forth the essential facts of the offense charged. The allegations are in sufficient detail to enable the accused to prepare his defense and plead the charge in bar of a second prosecution for the same crime. No more is required of an indictment. *Hagner v. United States*, 285 U. S. 427, 431. Furthermore, appellant was not hurt by the failure of the indictment to state the name of the Senator who administered the oath to him before the subcommittee, or the name of the foreman who administered the oath before the grand jury, and their statutory authorities so to do, as this information was furnished by a Bill of Particulars well in advance of trial (J. App. 26A).

It is not disputed that the indictment is sufficient to meet the requirements of Rule 7(c), but appellant argues that the contents of the indictment are controlled by 23 D. C. Code (1951 Ed.) § 204 which he states is a law enacted after the promulgation of Rule 7(c). (Appellant's Brief, p. 9.)

An examination of Sec. 204, and the compiler's note, reveals that the section sets forth an old provision of the British common law adopted during the reign of George II, which was incorporated into the District of Columbia Code by the Act of March 3, 1901, 31 Stat. 1189, and has not since been reenacted. The publication of the 1951 edition of the code merely included a reprint of the 1901 law and certainly did not constitute a congressional reenactment of the statute.

Appellant relies principally upon *United States v. Debrow*, 203 F. 2d 699, in which the Court of Appeals for the Fifth Circuit, Judge Rives dissenting, held that a perjury indictment under the federal statute, 18 U. S. C. 1621, was fatally defective for failing to name the senator, and his authority, who administered the oath to the defendant before a Senate Committee, even though the statute requiring such allegation, 18 U. S. C. 558 (the counter-part of 23 D. C. Code § 204) had been repealed. The Supreme Court

granted the Government's petition for a writ of certiorari in the Debrow case, and heard argument on October 20, 1953. It is confidently expected that Debrow will be reversed.

The applicability of the Debrow case to a perjury indictment drawn under the D. C. Code has been considered and rejected by the court below, in *United States v. E. Merl Young*, 113 F. Supp. 20, by Judge McGuire; in *United States v. Lattimore*, 112 F. Supp. 507, by Judge Youngdahl; in *United States v. Herschel Young*, No. 1725-51, by Judge Holtzoff; and in *United States v. Dudley*, 1724-51, by Judge Schweinhaut.

Regardless of whether or not Debrow is reversed, however, it is not authority on this indictment, since fundamentally different procedural statutes are involved. The Debrow case construed 18 U. S. C. (1940 Ed.) § 558, which provided that it was sufficient for a perjury indictment "to set forth the substance of the offense charged upon the defendant, and by what court, *and* before whom the oath was taken, averring such court or person to have competent authority to administer the same, * * *." (Emphasis supplied.) 23 D. C. Code § 204 contains a similar provision, except the quoted conjunctive "*and*" is changed to the disjunctive "*or*," thus making it sufficient to allege "by what court, *or* before whom the oath was taken," with an averment of authority.

The fourth count of the indictment fully describes the grand jury before which the perjury was committed, with an averment that appellant *duly* took an oath before it in a matter "in which a law of the United States authorizes an oath to be administered." Since the grand jury is the investigative arm of the court, it is submitted that the allegation in the fourth count complies with the provision of Sec. 204.

The first three counts fully describe the subcommittee before which the perjury was committed, with an averment that appellant *duly* took an oath before it in a matter "in which a law of the United States authorizes an oath to be administered." The subcommittee was a competent tribunal within the requirement of the perjury statute. *United States v. Norris*, 300 U. S. 564; *Christoffel v. United States*, 338

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U. S. 84, 89. To be effective in prosecutions under the present perjury statute, the language of Sec. 204 must be equated with the provisions of Sec. 2501. Thus, the term "court" as used in Sec. 204 should be read as the "competent tribunal" of Sec. 2501. As so construed, the allegations of the first three counts of the indictment fully conform to the provisions of Sec. 204.

II

The Trial Court Properly Denied the Appellant Leave To File a Second Supplemental Motion To Dismiss the Indictment On the Ground that the Grand Jury Was Disqualified Since the Objection (1) Was Waived Because Not Included in the Original Motion To Dismiss, (2) the Denial Was Within the Court's Discretion, (3) the Proposed Motion Was Defective Because It Did Not Allege Prejudice To Appellant and Was Not Supported by Any Affidavit of Facts, and (4) It Did Not Allege Any Facts Constituting a Disqualification of the Grand Jury.

Appellant was indicted for perjury on February 28, 1952. He filed various motions on April 3, 1952, including a comprehensive motion to dismiss the indictment based upon the ground, among others, that the grand jury was summoned and constituted in an illegal manner and on the ground that the grand jury was not selected, drawn and impanelled in accordance with law because of the disqualification of two of the three jury commissioners (J. App. 17A). The motions were argued on April 29, 1952 and taken under advisement (J. App. 3A). Thereafter, on May 14, 1952, appellant was permitted to file a supplemental motion to dismiss on the ground that the appellant's alleged perjurious testimony was taken out of context (J. App. 22A). On December 23, 1952 appellant's motions were denied (J. App. 23A). Then, on January 2, 1953, over ten months after the indictment was filed and nine months after plea was entered, appellant sought leave to file a second supplemental motion to dismiss the indictment, based upon the alleged disqualification of the grand jury because of the exclusion from the jury lists of residents of the District of Columbia who voted in one of the States (J. App. 23A). Permission to file such a motion was denied by Judge Schweinhaut on January 26,

1953 (J. App. 26A), on the ground that it was lacking in substance and not timely presented under District Court Rule 92.

Leave to File the Motion was Waived. The denial of leave to file the subject motion was proper since, by not asserting the grounds thereof in the original motion to dismiss, in which appellant attacked the grand jury on two other grounds, the appellant waived his right to assert them. Rule 12(b)(2), F. R. Crim. P.

An additional indication of appellant's waiver of this objection is the fact that it was not renewed at the trial. In denying the motion Judge Schweinhaut specifically advised appellant that, if he wished, he might renew the motion at the trial. Appellant evidently did not wish to rely upon the objection since it was not renewed and the trial judge was not given an opportunity to consider the ground. Surely if appellant intended to save the point he would not only have raised the objection to the grand jury before the trial judge, but on the same ground would have attacked the petit jury which convicted him.

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Denial of Motion was Within Court's Discretion. While the District Court had discretion to grant relief from the waiver for cause shown (District Court Rule 92, and Rules 12(b)(2) and (3) F. R. Crim. P.), the Court stated that no cause was shown why the waiver should not be enforced, and the Court's refusal to permit the motion to be filed was thus not an abuse of discretion.

Appellant does not show that he was diligent in ascertaining the facts upon which this motion is based. In fact, it is evident from his motion that, while learning of the facts on November 20, 1952, he did not present this objection until after the Court had denied his various other attacks upon the indictment. Clearly this ground was not believed by appellant to have merit, and was offered as a last ditch effort to strike the indictment only after all other attacks had failed.

Motion was Defective in Law. It is well settled that motions attacking the qualifications of the grand jurors are dilatory in nature, are not favored by the courts, and that leave to file such a motion should be denied unless it con-

become a *class* of persons such as a political, social, economic, religious or racial group. Such voters represent all classes; they come from all groups. The naturalized dishwasher obviously has no common class interest with the retired bank president merely because, while residing in the District of Columbia, one votes in Brooklyn and the other in San Francisco.

In denying the motion in the *Bramblett* case, *supra*, Judge Letts stated:

The defendant bottoms his contention upon the principle of law that prospective jurors shall be selected by court officials without systematic and intentional exclusion of any economic, social, religious, racial, political or geographical groups of the community. The principle of law is well stated in *Thiel v. Southern Pacific Co.*, 328 U.S. 217. So far as this writer knows the correctness of such principles has never been doubted and has been departed from by no court.

* * * * *

Granting that the jury commission erred in applying the voting test in determining whether or not prospective jurors were residents of the District of Columbia, such error did not constitute an intentional and systematic purpose to exclude them as voters. The erroneous understanding of the law and the application of an unwarranted test as to residence in the District of Columbia resulted only in an irregularity. It has never been supposed that the jury commissioners, unlike all mankind, were incapable of mistake.

Even if there was an irregularity in the selection of the grand jury which returned the indictment, such irregularity will not avail the defendant except and unless such irregularity has resulted in hurt or prejudice to the defendant. *Medley v. U.S.*, 81 U.S. Apps. D.C. 85, cert. denied 328 U.S. 873; *Romney v. U.S.*, 83 U.S. Apps. D.C. 150. The record does not disclose that because of the irregularity the defendant has suffered any injury or in any manner been prejudiced.

Since the record reveals no intentional and systematic exclusion of prospective jurors defendant's motion to dismiss the indictment upon such ground must be denied.

It is submitted that appellant's proposed motion was waived because proffered too late for filing, that it was de-

fective in not including sworn affidavits in support of its hearsay assertions, that on the facts before the court the motion did not present meritorious grounds for the relief sought, that no prejudice to the appellant was claimed, and that the court below therefore properly denied leave to file the motion.

III A

A Subcommittee of the United States Senate, Having the Power To Compel Testimony under Oath and Sitting With a Quorum as a Competent Tribunal On a Matter Within Its Legislative Capacity, Does Not Become an Incompetent Tribunal under the Perjury Statute Merely Because It Fails To Observe a Senate Rule Against a Committee's Sitting Without Permission While the Senate Is in Session.

Appellant contends that Count 3 of the indictment must fall because the subcommittee without first having obtained permission, continued its hearing on February 27, 1951, after the Senate went into session, during which time the appellant's alleged perjurious testimony was given (Br. 19). It is appellant's contention that even though competent before the Senate session began, the subcommittee became incompetent thereafter because it failed to comply with Sec. 134(c) of the Legislative Reorganization Act of 1946, (Act of August 2, 1946, Ch. 753, 60 Stat. 837), providing:

(c) No standing committee of the Senate or the House, except the Committee on Rules of the House, shall sit, without special leave, while the Senate or the House, as the case may be, is in session.

It is the Government's position that non-compliance with this provision did not affect the competence of the subcommittee to sit. In the first place, the rule applies to standing committees, not subcommittees. This rule should be construed, if possible, in such manner as to uphold the subcommittee's competence. In this case the Subcommittee on R.F.C. consisted of seven senators, with only one constituting a quorum, whereas its parent body, the Committee on Banking and Currency, consisted of thirteen members. (G. Exs. 4 and 5.) It is logical to assume that the Senate issued the rule because the unauthorized absence from the Senate

floor of a full committee might have interrupted its business, whereas the absence of a subcommittee would have been inconsequential.

The deliberate intention of Congress to limit this rule to standing committees, and not to include subcommittees, is indicated by the other provisions of Sec. 134 under Committee Powers. Sec. 134(a) provides that "Each standing committee of the Senate, including any subcommittee of such committee," is authorized to hold hearings, issue subpoenas, etc. Sec. 134(b) provides that "Every committee and subcommittee" shall report certain information concerning its staff members. Sec. 134(c), however, the last section under Committee Powers and the one here under consideration, specifies only a "standing committee." Since Sec. 134(c) by its express language applies only to a full committee, and since the language appears to have been deliberately chosen, and since there is logic and reason for so limiting the language, this Court should construe the section to apply only to a full "standing committee."

However, it is the government's position that the time at which the subcommittee sat, with or without the consent of the Senate, did not affect its competence as a tribunal within the meaning of the perjury statute. To constitute a subcommittee a competent tribunal under this statute, it is necessary only that the subcommittee have authority to compel testimony under oath, that it be engaged in a legislative function within its jurisdiction, and that it be composed of a quorum of its members. *United States v. Curtis*, 107 U.S. 671; *United States v. Williams*, 341 U.S. 58; *Christoffel v. United States*, 338 U.S. 84. Appellant concedes that the subcommittee was a competent tribunal when the hearing began (Br. 24). Having the essential elements of competence the subcommittee continued to be a "competent tribunal" throughout the hearing whether or not it literally complied with all of the procedural rules adopted by the Senate for its convenience.

The *Christoffel* case, *supra*, on which appellant relies, held in effect that a congressional committee without a quorum is no committee, and that evidence of a lack of

quorum at the time the perjurious testimony was given is admissible to attack the existence of the tribunal. Of course, it is fundamental in the law that all formal bodies, whether corporate, legislative, club or otherwise, can function only when composed of a specified quorum of its members. But Christoffel is not authority for holding that once a formal body acquires a quorum and enters upon the transaction of business within its jurisdiction, it loses its competence because of the failure to observe a non-judicial rule adopted for its own convenience.

While Sec. 134(c), Legislative Reorganization Act of 1946, is dressed in statutory garb, it clearly does not have the force of a statute and is only a rule of the Senate. To view it as a statute, binding on the Senate until repealed by an Act of Congress, would render it violative of Article I, Section 5, Clause 2 of the Constitution. *United States v. Ballin*, 144 U.S. 1, 12 S. Ct. 507, 36 L. Ed. 321; *Chapman v. United States*, 8 App. D.C. 302, pet. den. 166 U.S. 661. To avoid the possibility of such a construction, Section 101 was inserted in the Act which provides that the sections thereof were enacted "(a) As an exercise of the rule-making power of the Senate and House * * *; (b) With full recognition of the constitutional right of either House to change such rules (so far as relating to the procedure in such House) at any time, in the same manner and to the same extent as in the case of any other rule of such House."

Though apparent on its face, the history of Sec. 134(c) indicates that it was adopted for the convenience of the Senate as an aid to assuring the presence of a quorum at its sessions. In 1946, Senator LaFollette submitted to the Senate the Report of the Joint Committee on the Organization of Congress, Sen. Rep. No. 1011, 79th Cong., 2nd Sess., Sen. Doc. No. 11014, which stated:

We also recommend that the rules of the Senate be amended to provide that no committee shall sit during the sitting of the Senate, without special leave. The House of Representatives adopted such a rule in 1794.

This recommendation was incorporated in S. 2177, 79th Cong., 2nd Sess. which became Public Law 601 of the same

Congress, known as the Legislative Reorganization Act of 1946. Further light on the purpose of this provision can be found by reference to its history in the House which adopted it in 1794. When, in 1880, the House Committee on Rules reported out a suggested revision of the rules, the old rule that "No committee shall sit during the sitting of the House without special leave" was omitted. Mr. Robinson moved that it be again inserted in the House rules. When Mr. Blackburn informed him that the rule was unnecessary because Rule VII, requiring every member of the House to be in his seat when the House was in session, achieved the same result, Mr. Robinson replied that Rule VII was a very indefinite rule and

We have had it [the rule on committee sitting] here since 1794 and it will do no harm, for the proper transaction of the business of the House, to retain it.

From this it would appear that the sole purpose of Sec. 134(c) is to aid the Senate in the transaction of its business by assuring that a quorum will attend its sessions. It is a rule designed for the convenience of the Senate. It no more goes to the competence of the committee than does Sec. 133(a) requiring that the committee fix regular days for the transaction of its business, or Sec. 133(b) requiring that the committee keep a record of its action, or Sec. 134(b) requiring that the committee report the name, profession and salary of each staff member, etc. The failure to comply with such rules is a matter of which the Senate might take remedial action, but the failure obviously does not affect the competence of the tribunal to conduct its business or afford a legitimate ground of complaint by the appellant. ~~*Bryan v. United States*, 339 U.S. 323; *Ex parte Ward*, 173 U.S. 452, 19 S. Ct., 43 L. Ed. 765; *Blair v. United States*, 250 U.S. 273, 39 S. Ct. 468, 63 L. Ed. 979; *State v. Walton*, 53 Or. 557, 101 Pac. 389; *Boehm v. United States*, 123 F. 2d 791 (C.A. 7), cert. den. 315 U.S. 800; *Smith v. State*, 31 Tex. Cr. 315, 20 S.W. 707.~~

However, if the Court should hold that Count 3 is defective because of the incompetence of the tribunal, the con-

viction on the other counts should not for that reason be reversed as argued by appellant. A review of the evidence in support of Count 3 demonstrates that it is completely distinct from the evidence adduced in support of the other counts and does not consist of inflammatory matter. While appellant sought at the trial and in his brief to inject the element of political prejudice into this case (Tr. 955, 970, 972), the record is bare of any remarks or conduct of Government prosecutors tending to achieve this result. Appellant cites no evidence to bolster his argument. His contention is without foundation in fact and should be rejected.

III B

At the Time of Appellant's Perjury, the Subcommittee Was Engaged in Making an Inquiry and Study Into the Operations of the R.F.C. as Directed by the Senate, and Thus Was Engaged in a Legislative Function.

Appellant urges the reversal of conviction on Counts 1, 2 and 3 on the ground that at the time of his testimony, the subcommittee was not engaged in a legislative function. There is no merit to this contention.

S. Res. 219 directed the Committee on Banking & Currency, or its subcommittee, to conduct a thorough study of the operations of the R. F. C., with special attention to the recommendations of the Hoover Commission (G. Ex. 1). The Hoover Commission had reported that lending "opens up dangerous possibilities of waste and favoritism" and "invites political and private pressure, or even corruption." It recommended that Congress reconsider the power of Government agencies to make direct loans, "taking into account the problems of economy, efficiency, and integrity." (G. Ex. 2, pp. 23, 24, 44.)

Pursuant to S. Res. 219, the subcommittee on the R. F. C. held extensive public and executive hearings at which considerable testimony concerning R. F. C. operations was taken (G. Ex. 11, p. 4). As a result of its study, the subcommittee issued an interim report on May 19, 1950 concerning the Texmass Petroleum Co., and on August 11, 1950

issued a second interim report on the Lustron Corp. transportation contract (G. Ex. 12, p. 1). On February 5, 1951 the subcommittee issued its third interim report on the subject of Favoritism and Influence affecting the R. F. C., in which it favorably reported S. 514, a bill proposing that the management of the Corporation be vested in a single Governor instead of the existing five-man Board of Directors (G. Ex. 11, p. 1).

In this interim report the subcommittee made specific findings critical of the appellant, E. Merl Young, "The individual named most frequently in the reports of special influence * * *." (G. Ex. 11, p. 6). Thereafter, following criticism of the interim report, the subcommittee held public hearings and took additional testimony on the subject matter of the report (G. Ex. 14). On February 21 and 27, 1951, appellant testified under subpoena to the matters forming the basis for Counts 1, 2 and 3 of the indictment. In his testimony, the appellant directly contradicted the findings set out in the subcommittee's report (G. Ex. 14, pp. 609-14).

It is not disputed that the subcommittee had authority to conduct the investigation required by S. Res. 219, to hold hearings and take testimony on Favoritism and Influence, and to issue its third interim report on that subject. Nor is it disputed that appellant's perjurious testimony was material and pertinent to the subject. However, the appellant argues that after the interim report was issued and S. 514 favorably reported, the subcommittee lost jurisdiction to hear further evidence on favoritism and influence and, therefore, that it was not engaged in a legislative function at the time of his testimony.

The mandate of the Senate to make a thorough study of the R. F. C. did not limit the subcommittee's functions to a hearing and report on S. 514. The Subcommittee on the R. F. C. was a standing subcommittee of the Committee on Banking and Currency (G. Exs. 5 and 6) and, as such, had continuous jurisdiction over legislative matters which might affect that corporation. As long as its inquiry was directed at a matter within the scope of S. Res. 219, it was engaged in

a legislative function since evidence adduced might have caused it to take legislative action within its jurisdiction.

Appellant refers to language in the third interim report and in subsequent statements by Senator Fulbright, chairman of the subcommittee, which he interprets as an acknowledgment that the subcommittee's legislative functions ceased with the issuance of the report. This argument is untenable.

In the interim report itself, it is clearly indicated by the report of the minority members, that the subcommittee's legislative inquiry into favoritism and influence would be continued. It is there stated (G. Ex. 11, p. 4):

Since the report of the subcommittee is an "interim report" Senator Capehart reserves the right to express his opinion on S. 514, the proposed legislation to change the administrative structure of the RFC, at such time as intended further consideration of the matter has been completed and anticipated additional reports have been made by the subcommittee.

In the Final Report of the subcommittee, which favorably reported S. 515, a bill reorganizing the R. F. C. (G. Ex. 12, pp. 20-37), it is stated (G. Ex. 12, pp. 1-2):

In issuing the report on Favoritism and Influence, the subcommittee announced that it would be supplemented by two further interim reports, but the public response to the report on Favoritism and Influence was such that this plan was dropped and, instead, the subcommittee held a series of open hearings in which the details of its inquiry into this phase of RFC operations were spread on the public record through the testimony of witnesses. In the opinion of the subcommittee these hearings fully substantiated the report. They have been printed in two volumes designated as Lending Policy, Part 2, and Lending Policy, Part 3.

From the foregoing it seems obvious that the hearings in question were conducted by the subcommittee in the exercise of a legislative function because it was inquiring into a matter within its jurisdiction, the appellant's testimony was material to the inquiry, and the hearings might have changed the subcommittee's ultimate findings and report

with respect to the desirability of the legislation under its consideration. *Barsky v. United States*, 83 App. D. C. 127, 167 F. 2d 241, cert. den. 334 U. S. 843; *In re Chapman*, 166 U. S. 661, 669; *McGrain v. Daugherty*, 273 U. S. 135; *United States v. Norris*, 300 U. S. 564; 40 Harv. L. Rev. 153, 194-97, 217-18; 33 Col. L. Rev. 4-9.

IV

There Is Substantial Evidence of Appellant's Guilt On at Least One Count of the Indictment, and the Judgment of Conviction Should Therefore Be Affirmed Since the Same Sentence Was Imposed On Each of the Four Counts, To Run Concurrently, and Each Was Within the Maximum Assessable On Any Count.

With respect to Point IV the appellee desires the Court to read the pages of the reporter's transcript set out in the argument on each count.

Appellant urges reversal on the ground that the trial judge erred in refusing a motion for judgment of acquittal because of the lack of substantial evidence to sustain guilt upon all counts of the indictment (Point IV, Br. 29).

Appellant's contention invokes the rule that an appellate court must sustain the jury's verdict if there is substantial evidence to support it, taking the view most favorable to the government and disregarding contradictory evidence. *Glasser v. United States*, 315 U. S. 60-80; *Curley v. United States*, 81 App. D. C. 389, 160 F. 2d 229, cert. den. 331 U. S. 837; *Ross v. United States*, 197 F. 2d 660 (C. A. 6).

Under the "two witness" rule in perjury cases, a jury verdict must be sustained if it is supported by the direct testimony of two witnesses to the falsity of the oath, or the direct testimony of one witness plus corroborating evidence. "Two elements must enter into a determination that corroborative evidence is sufficient: (1) that the evidence, if true, substantiates the testimony of a single witness who has sworn to the falsity of the alleged perjurious statement; (2) that the corroborative evidence is trustworthy." *Weiler v. United States*, 323 U. S. 606, 610.

The *Weiler* case means that, while sufficient, it is not es-

sentential to a perjury conviction that the falsity of the oath be proved by the direct testimony of two witnesses, or one witness plus corroboration. The two-witness rule is satisfied by evidence of admissions of the accused, substantiated by trustworthy documentary or corroborative evidence. Maragon v. United States, 87 App. D. C. 349, 187 F. 2d 79, cert. den. 341 U. S. 932.

The substantial evidence adduced in support of each count was such as to justify a jury's conviction beyond a reasonable doubt that appellant had wilfully and intentionally testified, as charged, to matters he did not believe to be true.

Since the same sentence was imposed on each count, all to run concurrently, and each was within the maximum that could be imposed on any of the counts, the judgment should be affirmed if there is substantial evidence to support any count not otherwise fatally deficient. Claasen v. United States, 142 U. S. 140.

check

Count 1

As to Count 1, appellee desires the Court to read the following pages of the reporter's transcript; 202-03, 208, 212-14, 218-19, 224-30, 341-43, 373, 680-81, 685-86, 762 and 856-57.

Appellant was convicted on Count 1 of perjuringly testifying before the subcommittee on the R. F. C.: "While I was employed by the Reconstruction Finance Corporation I never had anything to do with the loan applications made by Lustron." (J. App. 11A.)

There was introduced in evidence a loan application for \$10,000,000, dated June 1, 1948, made by Lustron to the R. F. C. (G. Ex. 16). There was also introduced a recommendation by the R. F. C. review committee that the loan be approved by the Board of Directors, which recommendation bore the written concurrence of the loan examiner, E. Merl Young, the appellant (G. Ex. 17).

Morton Macartney, an employee of the R. F. C. for 19 years, testified that he was manager of the loan office in Washington in 1947 (Tr. 202), in which office the appellant

was employed as an examiner (Tr. 203). He testified that at that time the duties of an examiner, upon receipt of a loan application at the R. F. C. in Washington, were to analyze, write reports on, and make recommendations for or against approval of the application, which reports and recommendations were forwarded with the application to the R. F. C. review committee for its recommendation, after which the application, together with all the reports and recommendations, were sent to the Board of Directors for approval or disapproval (Tr. 224-230). Macartney testified that if the borrower made an application for an additional loan, the examiner would have about the same duties as if he were examining an original application (Tr. 208). He testified that if a loan application were approved, the money would not be paid to the borrower in a lump sum, but would be disbursed as needed; that the borrower had to make requests for disbursements under the loan, which had to be approved by the R. F. C. before the money was paid; that the examiner made recommendations upon the applications for disbursements, which function was called "servicing" the loan (Tr. 212-13), and that final approval of the Board of Directors was required before disbursements were made (Tr. 214). Macartney testified that he and E. Merl Young, the appellant, signed the recommendation for approval of the application for additional loan of \$10,000,000 made to the R. F. C. by Lustron (Tr. 209, G. Exs. 16, 17); that he signed in the performance of his official duties as manager of the loan office, and that appellant was an examiner in the office at the time (Tr. 218-19). [Note: Although Macartney could not positively identify Young's signature on G. Ex. 17, the appellant later admitted that it was his (Tr. 762)]

Hubert Steele, an experienced examiner who had been with the R. F. C. for eleven years (Tr. 341), testified to the same effect as Macartney as to the duties of an R. F. C. examiner (Tr. 342, 373). He further testified that there was no distinction between an examiner who worked on applications and one who serviced an approved loan, as the duties were in principle the same and all examiners performed

both functions, even though one might service a loan on which another had made the original study and recommendation (Tr. 373). If an examiner were servicing a loan, and the borrower made application for additional loan, it was the duty of such examiner to study the additional application and make a recommendation for approval or disapproval, even though another examiner may have handled the original application. In all cases, the examiner was free to recommend for or against approval of the loan (Tr. 343).

Harvey J. Gunderson testified that when he was a member of the Board of Directors of the R. F. C., the appellant, E. Merl Young, was the examiner who serviced the Lustron loan (Tr. 680-81); that the Lustron application for additional loan of \$10,000,000 was recommended for approval by the review committee and transmitted to the Directors. Gunderson testified that while the application was under discussion by Directors Hise, Willett, himself and perhaps others, it was noticed that the review committee's recommendation did not bear the concurrence of the appellant Young as examiner, or of Macartney, manager of the loan office, and it was returned for the purpose of getting their signatures (Tr. 685-86).

Appellant's admissions were introduced in evidence, in which he acknowledged that he received the review committee's recommendation for approval of Lustron's application for the additional \$10,000,000 loan (G. Ex. 17), read it, approved the recommendation, and in the performance of his official duties as an R. F. C. examiner, signed his name to the document concurring in the review committee's recommendation (Tr. 856-57).

It is submitted that the foregoing is substantial evidence supporting the jury's verdict on the first count.

Count 2

With respect to Count 2, the appellee desires the Court to read the following pages of the reporter's transcript: 341, 346, 353-57, 380-82, 386-87, 389-91, 447-50, 765-66, 783, 830, 840 and 865.

On Count 2 appellant was convicted of perjuringly testifying before the subcommittee on the R. F. C.: (J. App. 12A.)

Wink
All my income since leaving Government employ has been in the form of salaries from employers or advances from companies in which I owned an interest. I have never received 1 cent in the form of fees or commissions from anyone.

Hubert Steele testified that he resigned his position as R. F. C. examiner in October, 1949 (Tr. 341) and entered business as a financial consultant and Washington representative, under the partnership name of Ribenack & Steele (Tr. 346). He testified that among his clients was W. J. Binkley, president of the Binkley Manufacturing Co., Warrenton, Mo., who had previously obtained a loan from the R. F. C. on which Steele had been the examiner (Tr. 347-50), and under which disbursements were still being made. Steele and Binkley went to Young's office and Steele asked Young to help him in obtaining Government contracts for Binkley and in taking care of any problems that might come up in the R. F. C. in connection with Binkley's loan. After some discussion, Binkley withdrew. After Binkley left, Steele told Young that he expected to ask Binkley for a fee of \$7,500 per year and that if Young would assist him in getting Government contracts for Binkley and take care of Binkley's R. F. C. problems, he would split the fee with him. Young replied, "You are new in the business and I would be very glad to do anything I can to help you out." Steele testified, "It was a gentlemen's understanding that when the checks came in, I was to give him half of them." (Tr. 353-55). After leaving Young's office, Steele and Binkley agreed upon an annual fee for Steele of \$7,500 (Tr. 356-57). When the first monthly check of \$625.00 for Steele's fee was received (G. Ex. 28), Steele drew his partnership check for half the fee, \$312.50, payable to Young (G. Ex. 27), and gave it to the appellant. At that time Young said he had not done anything and did not want the money. Steele threw the check on appellant's desk and said, "Here is what I owe you." Steele told Young he expected to get more business and would split the fee with him (Tr. 354-55).

W. J. Binkley, president of Binkley Manufacturing Co., Warrenton, Mo. (Tr. 380), testified that he had obtained a loan from the R. F. C. on which Steele had been the examiner (Tr. 381); that he employed Steele as his Washington representative (Tr. 382); that he and Steele met appellant in the latter's office (Tr. 389), at which time Steele talked to Young about getting Government contracts for Binkley Manufacturing Co. (Tr. 391); that although he does not recall the time of the meeting it was the only time he had met appellant (Tr. 387, 390) and that he agreed to pay Steele a fee of \$625.00 per month for one year (Tr. 386).

E. Merl Young, the appellant, testified that on July 15, 1948 he resigned as an examiner of the R. F. C. and became a Washington representative for the Lustron Corp. and F. L. Jacobs Co. (Tr. 783, 840); that Binkley and Steele came to see him and discussed Binkley's desire to get government contracts carrying a steel priority; that after a short discussion Binkley stepped out and Steele said, "he would appreciate anything I could do" (Tr. 765); that Steele thereafter gave him a check for \$312.50, representing half the first payment of Binkley's fee, saying, "This is money I owe you, take it" (Tr. 765-66, 830); that he kept the check for two days debating whether or not to take it, since he had done nothing for Steele, and then decided to accept it and cashed it (Tr. 766); and that he owned no interest in Ribenack & Steele or Binkley Manufacturing Co. (Tr. 865).

It is submitted that the foregoing testimony, corroborated by the documentary evidence introduced, substantially supports the verdict on this count.

Count 3

With respect to Count 3, the appellee desires the Court to read the following pages of the reporter's transcript: 402-06, 417, 432-34, 509-10, 513, 536, 542, 544, 548-49, 553, 783, 795, and 831-32.

Count 3 charges that before the subcommittee on the R. F. C. appellant perjurally testified, in substance, that other than loans he had received of \$32,000 from the Atlan-

tic Basin Company, \$7,500 from Mr. Rosenbaum, \$8,500 from L. N. Rosenbaum, \$120,000 (on appellant's account, \$30,000) from the F. L. Jacobs Co., he did not know of any other loans he had received (J. App. 14-15A).

W. J. Peoples testified that: In October, 1949, he was president of the United States Radiator Corp. at Detroit, Michigan, when appellant asked him for employment. He was told that appellant was resigning from the Lustron Corp. and he considered hiring appellant as an officer of U. S. Radiator because he believed Young might be able to obtain the Lustron radiator business for his company. In October, 1949, while the matter of Young's employment was under consideration by the radiator company officials, appellant telephoned Peoples saying he needed some cash, and asking if Peoples would help him out. Peoples replied that he would and immediately sent appellant a check for \$1,000. Young called Peoples and thanked him for the check. In November, 1949, Young again called Peoples and again asked for financial assistance, and Peoples sent Young a second check for \$1,000. In December, 1949 Young made a third such request, and once more Peoples sent him a check for \$1,000 (Tr. 402-06, G. Ex. 31). Young never repaid the loan (Tr. 417).

The appellant testified that he received the three \$1,000 checks from Peoples and entered them on his books as loans (Tr. 850-51).

Charles A. Koons testified that: In October, 1949 appellant telephoned him and asked if he knew a good stockbroker in New York. He told Young he did, and Young asked him to order him (appellant) 1,000 shares of F. L. Jacobs Co. stock. Koons placed the order with Winslow, Douglas and McEvoy, New York stockbrokers, and the stock was ordered on October 13, 1949, for the account of appellant, and sent to appellant, receipt of which was acknowledged (Tr. 432, 536, G. Ex. 39). When Koons notified appellant that payment for the stock was due, appellant said, "Well, I am a little short right now. Would you go ahead and pick it up for me?" Koons agreed, and issued

his check to the broker on November 10, 1949, in the amount of \$5,983.80 in payment of Young's stock purchase (Tr. 432-33, G. Ex. 33). Koons treated this advance to Young as a loan and transmitted notes to Young for execution covering the obligation (Tr. 433-34, 509, 513, G. Exs. 38 a-b, 40). However, Young did not sign the notes or repay Koons (Tr. 434, 510).

Ernest J. Capen testified that: He was a stockbroker associated with Winslow, Douglas and McEvoy, and that Charles A. Koons was one of his customers (Tr. 542). On October 13, 1949 Koons called him and gave an order to buy 1,000 shares of F. L. Jacobs stock for the account of E. Merl Young, and the order was executed and the stock sent to Young (Tr. 544, 553). The account of E. Merl Young was debited on the purchase and he looked to Young for payment (Tr. 548). Koons did not order the stock for himself or agree to pay for the stock (Tr. 549).

The appellant testified that Koons paid for the F. L. Jacobs stock purchased for him (Tr. 783, 831-32) and did not deny that Koons sent notes to him covering the obligation, with the request that he sign them (Tr. 795).

It is submitted that the above testimony, plus the corroborating documents, substantially supports the verdict on the third count.

Count 4

With respect to Count 4, the appellee desires the Court to read the following pages of the reporter's transcript: 431, 434-37, 440, 504, 506, 508, 514, 517, 527-28, 530, 809-10, and 896.

Count 4 charges that, before a grand jury of the District of Columbia, appellant perjurally testified in the following colloquy: (J. App. 16A.)

Q. Were you paid by anyone or by any company for any efforts expended in their behalf in putting them in touch with any government employee or official about matters they had before such agencies?

A. No, sir. The only pay I ever received was in the form of a salary from Lustron and Jacobs. I never

received any commissions, anything from any other company at all.

Mr. BEATON: Do you mean from 1948 to the present time?

The WITNESS: Yes.

This count charges perjurious testimony as to two matters, first, appellant's denial that he was "paid by anyone or by any company for any efforts expended in their behalf in putting them in touch with any Government employee or official about matters they had before such agencies."

Charles A. Koons testified that: He was in business in New York City, under the name of Charles A. Koons & Co., buying and selling steel and machinery (Tr. 431); that he employed E. Merl Young as his Washington representative at a salary of \$1,500 per month (Tr. 434); that Young's duties were to do "leg work" in Washington, appear before Government agencies, file applications for export licenses, and to do the general work of a Washington representative (Tr. 437, 514, 517). [It is believed that this Court may take judicial notice that a "Washington representative" is one who is employed to expend efforts in behalf of his clients to put them in touch with Government agencies or officials about matters they have pending before such agencies.] Koons testified that while Young was in his employ, he wrote Young to take care of three matters pending before Government agencies (1) the Weber matter in the State Department (Tr. 440, 504, 527, G. Ex. 35 a-b), the Leitz matter in the Office of Alien Property Custodian (Tr. 440, 506, 530, G. Ex. 36), and the Jack Gidera matter in the E. C. A. (Tr. 508, 528, G. Ex. 37).

Secondly, this count charges that appellant perjurally testified, "the only pay I ever received was in the form of a salary from Lustron and Jacobs. I never received any commissions, any thing from any other company at all."

Koons testified that by six checks (G. Ex. 34), he paid Young as his Washington representative a salary of \$1,500 per month for the months of December, 1949 and January and February, 1950 (Tr. 434-37).

E. Merl Young, the appellant, testified that he was employed for three months by Koons as a Washington representative at a salary of \$1,500 per month (Tr. 896-97), and that Koons referred to him for attention the Weber and Leitz matters (Tr. 809-10).

It is submitted that the foregoing testimony, plus the corroborating documents, is substantial evidence in support of both perjurious statements, and most certainly of the second, alleged in Count 4.

V

Appellant Fails to Demonstrate Any Misconduct of the Prosecutors Warranting Reversal

With respect to Point V, appellee desires the Court to read the following pages of the reporter's transcript: 347-48, 350, 353-54, 363, 376, 669, 677-79, 700-03, 761, 765, 770-74, 788-93, 796-804, 819, 821-29, 838, 841-42, 855-57, 879-88, 899-908, 914, 919, 981-85, 991-92, 994, 1002-03, 1011-14, 1023 and 1030.

(a) Under this heading of alleged prejudicial conduct of the prosecutors, appellant first argues that there should be a reversal because he contends one of the prosecutors suggested to the jury that appellant was a "five-percenter" by asking a government witness if his contract with a manufacturer was not on a basis of five percent for government contracts obtained.

The witness, Hubert Steele, had, as an R. F. C. examiner worked on an R. F. C. loan to Binkley Mfg. Company of Warrenton, Mo. (Tr. 347); while working on the loan he met Binkley; when Steele resigned from R. F. C. he sent out announcements as "financial consultants and manufacturing representatives;" thereafter Binkley called at his office (Tr. 348). He then went on to testify that he had a contact with the appellant that involved Binkley's firm, relating how Binkley wanted to get some government business, wanted Steele to be his Washington representative to "go to the government departments and so forth and so on and find out what they were accepting bids on in connection with

what his plant might produce." Steele said he was a novice, in that connection, so he suggested going over to see the appellant whose associations in government had been much better than his, and that he wanted appellant to make appointments for him or introduce him (Tr. 350). They went to appellant's office and told appellant what he was interested in "as far as the getting new business was concerned;" that he, Steele, would do the "leg work" and give appellant half of any fee he might set; that he then set \$7500 a year, which was \$625.00 a month, half of which was \$312.50, the amount of the check later delivered to appellant. He also asked appellant to handle anything for Binkley that might turn up at R. F. C. (Tr. 353). Appellant did not say he would do so but said he would be glad to help Steele out since Steele was "new in business" (Tr. 354). Then Steele went on to relate further details of their arrangement with Binkley, payment, etc., and to identify checks, bills, and a letter employing him as "financial consultant and Washington representative" (Exs. 27, 28, 29, 30).

At this juncture the prosecutor read the letter of employment to the jury and then asked Steele if that was the whole agreement. He replied, "That is the package;" whereupon the prosecutor asked if he didn't have a 5% arrangement with him. Appellant's counsel himself then asked, "With whom?"; whereupon the prosecutor replied, "Binkley Mfg. Co." and the witness answered, "yes."

This testimony we contend was clearly admissible as relevant to prove the second count set forth in full at J.A. 11-13. It was proper for the jury to hear all the details of the arrangements made between Binkley, Steele and Young. The mere fact that evidence logically relevant reflects unfavorably upon a defendant, or even discloses other criminality than that charged, does not render it inadmissible. Actually there was a 5% arrangement, and the \$7500 was to be deducted from any such commissions (Tr. 367). Steele had a "gentleman's agreement" with appellant that appellant was to get half of what Steele got from Binkley (Tr. 376). Moreover, appellant's counsel himself asked the

question "With whom?", instead of objecting, if actually he thought the subject matter objectionable.

The Court excluded the answer, however, and in effect told the jury to disregard it (Tr. 363). The Court did not further allude to the matter in its charge. Appellant's counsel took no exception to the charge as given and asked for no further instructions to disregard the question and answer of which complaint is now made.

The testimony from Steele which had preceded this incident and the pertinent documents, showed beyond any doubt that Steele was employed by Binkley to get government business or contracts and that appellant was to share equally in the anticipated income. Such relevant evidence, to which no meritorious objection was or could have been made, was proof, properly before the jury, that appellant was party to an agreement to get government contracts for substantial pay. It is difficult to see how a disclosure (if it were erroneous) of the percentage anticipated, in addition to the guarantee of \$7500 per annum, could have been more "inflammable" than the facts already legitimately in evidence, or so prejudicial as to warrant a reversal.

The alleged misconduct of the prosecutor in this and other instances stressed was nothing comparable to that in such cases as *Berger* (295 U.S. 78), cited by appellant, where the conviction was reversed, and *U. S. v. Buckner*, 108 F. 2d 921 (C. A. 2) where the conviction was sustained. [Cf. *United States v. Battiato*, 204 F. 2d 717 (C. A. 7) also *Hall v. U. S.*, 171 F. 2d 347; 84 U. S. App. D. C. 209 and *May v. U. S.*, 175 F. 2d 994; 84 U. S. App. D. C. 233, cert. den. — U. S. —.] As in the *Buckner* case, the proof here was "strong and convincing". In such cases instances of misconduct are less likely to warrant reversal. Appellee deems it unnecessary to cite additional cases on this point of alleged misconduct, our contention being that there was no misconduct of the prosecutors in this case, and that, if so, it was not so prejudicial as to warrant reversal.

The next "prosecutor's transgression" consisted of asking appellant on cross (after appellant had stated that he had no reason to testify to anything that was not true be-

fore the committee—Tr. 761, 765 and 842), if in the committee's interim report the Senators had not charged that appellant was selling influence or trying to sell influence at the R.F.C. (Tr. 888).

The prosecution in a perjury case may offer, in its case in chief, evidence of motive to give the alleged false testimony. *U. S. v. Hallock*, 185 F. 417 (C. A. 8); *Brzezinski v. U.S.*, 198 F. 65 (C.A. 2); 48 C. J., Perjury, ¶ 152. The prosecution in this case refrained from putting in evidence of appellant's motive to deceive the committee and the grand jury. The interim report itself, insofar as it commented upon appellant, could have been introduced, not to prove the truth of the statements contained in it, but to show appellant had every reason or motive to attempt to establish that the derogatory assertions were untrue. The prosecutors, we believe, could have introduced affirmatively evidence of appellant's motive. Having thus refrained, however, it certainly cannot be that the prosecutors could not ask *on cross of the defendant* questions designed to show motive, for instance, that he had been publicly and officially accused by the investigating Senate subcommittee of selling or attempting to sell influence at R.F.C. An admission that he had been so charged before testifying at the committee hearings would have tended to refute his bland assertion that he had no reason to perjure himself, and was legitimate cross-examination.

However, if we be wrong in our views, the record shows the trial judge sustained an objection to the question (Tr. 888). Although the prosecutor pointed out why he thought it legitimate cross-examination, the Court adhered to its ruling and told the jury that they were not concerned with the subject matter suggested by the question. Thus the claim of no motive or reason to falsify went unchallenged. Appellant truly is grasping at straws to rely upon this incident for a reversal.

Moreover, Appellant testified on cross-examination elsewhere without objection, to the fact the committee had commented unfavorably about him (Tr. 838, 841). The incident complained of, therefore, was harmless, if error at all.

Thirdly, appellant contends that it was error for the prosecutor to ridicule in argument the notion that the appellant could have forgotten he had anything to do with the loan application for ten million dollars (Tr. 992; Appellant's brief, page 66), when he told the committee under oath he had nothing to do with Lustron's loan applications.

The quotation in appellant's brief, page 66, is taken out of context. Appellee asks the Court to read the last paragraph of the argument at Tr. 991 and the first paragraph of Tr. 992.

Appellant's own brief at page 67 shows (and the record, Tr. 994, supports it), that all that happened was that defense counsel interrupted the prosecutor's argument, which was overlooked by the prosecutor and likewise went unnoticed by the trial judge. The interruption amounted to no more than defense heckling. No motion was made to strike the argument or to tell the jury to disregard it. At the conclusion of the argument, defense counsel made no point of this incident. This assignment of error obviously is an afterthought without substance.

The fourth alleged incident of the "prosecutor's transgressions" concerns itself with the argument quoted at page 67 of appellant's brief (Tr. 1002, 1003). Former R.F.C. Director Gunderson had been a defense witness, and a good one on direct, by supporting appellant in his contention that appellant had nothing to do with Lustron loan applications. The prosecutor was arguing that he did not stand up on cross. The argument is supported by the record and the prosecutor did not misquote the evidence (Tr. 677-9).

The reference to Gunderson and the lawyer who first advised appellant, when the committee published its interim report, reflecting upon appellant as an influence peddler, was borne out by the record (Tr. 669; 914, 919). Telling the jurors that they could draw their own conclusions from this, while characterized by appellant as a slur on Gunderson, was a legitimate argument that the jury could take this factor into consideration in weighing Gunderson's and Aiken's testimony. Appellant was friendly with the directors of R.F.C. (Tr. 700-703), all Presidential appointees,

and moved in this circle, and appellant was hired by Lustron as a result of suggestions by directors. Gunderson had come to his rescue as a witness in his behalf, seeking to bolster appellant's claim that he had nothing to do with Lustron loan applications. The interest, bias, and relations of a witness to the party who offers him are proper matters for a jury to weigh. However unpleasant or unwholesome facts shown in evidence may be, the prosecutor should have the right to call a spade a spade.

No objection was made to the argument at the time or at the conclusion of the argument. This assignment is another afterthought without substance.

Lastly, the prosecutor is said to have been guilty of "a very serious departure from the standard required" when he argued that the grand jury did not believe the defendant; that appellant's denials made no impression there, etc., see the quotation at pages 68-69 of appellant's brief.

The argument proceeds that this was a "deliberate comment by the prosecutor that an indictment is evidence of guilt." The absurdity of this contention is manifest by the fact that the prosecutor in the same breath said to the jury, "Of course, the indictment means nothing. That is just a charge. It is a means whereby he is brought in court."

Counsel for defense made a motion for mistrial at the conclusion of the argument on this alleged improper statement and then asserts in this court that the trial judge denied the motion and "merely gave the usual charge that an indictment is not evidence." The trial judge was at great pains, as a matter of fact, to explain the respective functions of grand and petit jurors. (Tr. 1011-1014, 1023). No exception was taken and no request for additional charge was made (Tr. 1030).

Moreover, the argument was proper in this case. It was a legitimate comment upon the evidence. It was *in evidence before the trial jury* that the appellant had testified before the grand jury and had made the same denials there that he did before the committee. Much of his grand jury testimony was read in evidence to the trial jury by counsel for the prosecution and the defense. (Tr. 821-829, 855-857, 879-

885, 886-887, 899-908, 981-985, 770-774, and Ex. 26). It was obvious to the trial jury, *from the evidence before them*, that the grand jurors did not believe appellant's denials, as argued, for they indicted him for making the same denials before the committee (Counts I, II and III) and for giving false testimony to them (Count IV).

Appellant told the committee he had nothing to do with Lustron loan applications (Count I). He repeated this to the grand jury, protesting and evading questions at length, and obviously did not convince the grand jury that he did not intentionally falsify to the committee. The argument, therefore, was based on the *evidence*.

Appellant was asked before the grand jury about his testimony before the committee as set forth in Count III concerning his loans, two of which he "forgot" to disclose under questioning before the committee. The grand jurors obviously did not believe his testimony relating to these two transactions as was argued, for they indicted him for his false denials of knowledge of these two additional loans. He did not before the grand jurors disclose the loans until he was specifically asked or knew the prosecutors probably had learned of them. The record shows he was evasive before the grand jury when asked about his relations to Peoples and Koons. If appellant thus was less than frank in his testimony before the grand jury, quite naturally the grand jurors would conclude that his denials of additional loans to the committee were intentional. The grand jury obviously did not believe him, as argued, and indicted him for perjury before the committee.

It was part of the defense to undertake to convince the trial jury that the appellant had made full and frank disclosures of "everything" to the grand jury. Tr. 761, 770-74, 788-93, 796-804, 819, 821-27. It was, therefore, legitimate argument that the grand jury did not believe appellant.

As to the fourth Count, it was obvious that the grand jurors did not believe appellant, as was properly argued, because they indicted him for falsely testifying *before them* that the only pay he ever received was in the form of salary from Lustron and Jacobs, and that he did not receive

"any commissions, anything from any other company at all," the truth being that he received \$1500 a month from Charles A. Koons Company from Dec. 1, 1949, through Feb. 1950.

In conclusion, it is submitted that the care with which appellant's able counsel has combed the record for trial errors in this case, involving a subject which could have lent itself to spectacular trial tactics on the part of the prosecutors, demonstrates the absence of any serious misconduct.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of conviction on all counts should be affirmed.

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